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Regulatory Transformations in International Economic Relations

Reguleringstransformaties in Internationale Economische Betrekkingen.

Proefschrift

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aan de Universiteit van Tilburg
op gezag van de rector magnificus,
prof. dr. F.A. van der Duyn Schouten,
in het openbaar te verdedigen ten overstaan
van een door het college voor promoties
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door

Richard Albertus Johannes Steenvoorde

geboren op 18 november 1973
te Alkemade

Promotores: Prof. dr. W.B.H.J. van de Donk
Dr. E.M.H. Hirsch Ballin

Contents

Abbreviations

AG 13	Ad-hoc group on article 13, established by COP-1, fin. June 1998
AGBM	Ad-hoc group on the Berlin Mandate, established by COP-1, concluded work in Kyoto, December 1997
AIJ	Activities Implemented Jointly
AOSIS	Alliance of Small Island States (42 states from the Pacific, Indian and Atlantic Oceans)
ATC	Anti-terrorism Coalition
CDM	Clean Development Mechanism
CEO	Chief Executive Officer
CFC	Chlorofluorocarbons are both ozone-depleting and greenhouse gases.
COP	Conference of the Parties to the 1992 UN FCCC on Climate Change
D.C.	District of Columbia
EC	European Community
EU	European Union
FCCC	Framework Convention on Climate Change 1992
FLA	Fair Labor Association
G77	Developing countries + China (in reality 120 countries)
GEF	Global Environment Facility
GC	Global Compact
GHGs	Greenhouse gases
ICJ	Statute of the International Court of Justice
ICSU	International Council of Scientific Unions
ICT	Information and Communication Technology
IPCC	Intergovernmental Panel on Climate Change (1988)
IMF	International Monetary Fund
INC/FCCC	Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (1991)
JI	Joint Implementation
LUCF	Land Use Change and Forestry
MIT	Massachusetts Institute for Technology
MOP	Meeting of the Parties to the Kyoto Protocol (in other words a COP of the FCCC serving as MOP to the Protocol
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental Organisation
OECD	Organization for Economic Cooperation and Development
OPEC	Organization of Petroleum Exporting Countries
QUELRO	Binding emission reduction target
SBI	Subsidiary Body for Implementation
SCCF	Special Climate Change Fund
SBSTA	Subsidiary Body of Scientific and Technological Advice
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
US	United States of America
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
WBCSD	World Business Council for Sustainable Development
WCP	World Climate Programme
WEF	World Economic Forum
WMO	World Meteorological Organization
WTO	World Trade Organisation

Acknowledgements

> "Living is the constant adjustment of thought to life, and life to thought in such a way that we are always growing, always experiencing new things in the old and old things in the new. Thus life is always new."
>
> Thomas Merton

Merton is right. And the process of writing this manuscript has taught me the deeper truth of his words. Adjustments were constantly needed to navigate through unfamiliar and uncharted terrains. But even more than that this journey has made me aware of the need to make adjustments not only rationally, but also within my own heart.

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However, I dedicate this book to

Jan-Paul
Ronald
Rudolf

For giving me the privilege of being my brother and best friends!

Geertruidenberg, January 28th 2008
Feast of St. Thomas Aquinas

Richard Steenvoorde

Prologue

> "In recent weeks, the speculators have been waging an all-out war on the American Dollar. The strength of a nation's currency is based on the strength of that nation's economy, and the American economy is by far the strongest in the world. Accordingly, I have directed the Secretary of the Treasury to take the action necessary to defend the dollar against the speculators. I have directed Secretary Connally to suspend temporarily the convertibility of the dollar into gold or other reserve assets, except in amounts and conditions determined"[1]

Introduction

These words were spoken by US President Nixon to the American public on August 15th, 1971. The suspension of the Gold Exchange Standard, which meant that US Dollars could no longer be converted to gold at a standard rate of $35 to the ounce, affected worldwide dollar stocks, especially the large stocks held by OPEC countries. In order to compensate for their losses, and in the wake of the political emotions of the 1973 Yum Kippur War, the OPEC countries announced on October 16th 1973 to raise the price of a barrel of crude oil by 17%. They also announced an embargo of oil exportation to the United States and the Netherlands. This resulted in a global recession that lasted for many years. The standard convertibility of the US Dollar to gold was never restored.[2]

In the meantime, OPEC dollars were deposited in Western banks. In order to avert the pending international economic crisis, the banks started to lend out money fast to developing countries regardless whether these recipients had the capacity to repay these loans.[3]

By the mid 1970s the developing countries realised that they were not making enough money to repay their debts. But there were more problems on the horizon. In this volatile macroeconomic environment there was a serious possibility that some industrialising countries were at risk of being unable to honour their own debts which in turn affected public confidence in domestic and international financial markets. Public confidence plummeted further in 1974 as a result of several well published bank failures that had international repercussions.[4]

It dawned on bank regulators that international cooperation was needed to fill a growing supervisory vacuum in the field of international banking supervision.[5] Thus, under the auspices of the Bank of International Settlements (BIS), the Basel Committee was created consisting of the central bank governors of the G-10

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1 President Richard Nixon, Address to the Nation Outlining a New Economic Policy: "The Challenge of Peace", August 15th, 1971, accessed at www.presidency.uscb.edu.
2 More on the 'Oil Shocks': Goldstein 2001, p. 503.
3 www.Jubileeusa.org
4 Reinicke 1998, p. 104-105.
5 Reinicke 1998, p. 104, www.jubileeusa.org, and Evans 1998.

countries plus Luxembourg. This committee was not constituted by a treaty, it did not have legal standing, nor did it have any official headquarters.[6] It also lacked serious means of enforcing its agreements other than through monitoring and peer pressure. Yet, in 1988 the members of the committee reached an agreement, the 1988 Basel Accord, that was heralded as the first major breakthrough in international regulatory cooperation.[7] This agreement helped to close the supervisory vacuum in the field of international banking supervision.

The prologue as introduction to this study

In 1973, the Dutch Government announced petrol-rationing and car-free Sundays (Autoloze zondagen), to deal with the oil-embargo and the higher prices per barrel oil. Although I was born on the first car-free Sunday of that year, November 18th 1973, that is not the main reason why I recall this case in the international political economy here. What is interesting, is that in order to overcome an emerging regulatory need in the wake of a global economic crisis, non-state actors, i.e. bank governors, developed a regulatory mechanism that became an international regulatory standard without state-involvement. Thereby this prologue offers a first impression of one of the many recent emerging regulatory arrangements in International Relations which are not always based on the traditional body of International Law.

The Committee's regulatory solution: the 1988 Basel Accord

In the aftermath of the economic crisis of the early 1970s, central bankers realised the need for international capital standards. Without these standards the emerging global financial system would become very unstable. The divergent capital standards would have adverse prudential effects. Weaker standards in one country would force other countries to intervene offensively, lowering their standards in order to protect their own banks. This would result in a negative cycle of competitive deregulation, with a great risk of losing public confidence in the financial system.[8]

At that time, national banking systems[9] were predominantly domestically orientated. Banking systems were conceived as a key symbol of a state's operational sovereignty and economic well-being.[10] This can illustrated by the following words spoken in 1977 by the then governor of the Bank of England, George Blunden:

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6 Slaughter 2004, p. 43.

7 Reinicke 1998, p. 105.

8 Reinicke 1998, p. 104-105.

9 The phrase "Banking system" might sound ambiguous. When the American Comptroller of the Currency speaks about the "National banking system", it refers to 2.000 national banks in the United States, their branches and other facilities (www.occ.treas. gov.). However, in general the usage seems to refer to whole network of national and commercial banks within a country: i.e. the Japanese banking system (Mansbach 2000, p. 419). See also: 'Banks welcome changes to the system', www.news.bbc.co.uk, 22 September 2007.

10 Although 'national' banks and 'central' banks started out with strong direct government involvement, this direct involvement has become significantly less. For example, on May 6th, 1997, the newly elected Chancellor Gordon Brown, gave the Bank of England independence

> The banking system of a country is central to the management and efficiency of its economy; its supervision will inevitably be a jealously guarded prerogative. Its subordination to an international authority is a highly unlikely development, which would require a degree of political commitment which neither exists nor is conceivable in the near future.[11]

Given this kind of attitudes, it is hardly surprising to note that it took the regulators a very long time, ten years, in a frustrating and slow process to harmonise their capital standards. Reinicke has argued that an unique set of domestic political circumstances and economic forces within the United States' political and economic system eventually drove the negotiations to a conclusion.[12]

In 1982, the Latin American debt crisis erupted. Many Latin American countries had borrowed heavily at North-American banks. Thus, North-American banks were especially hard hit by this news and some came close to facing bankruptcy. Calls for an IMF intervention became stronger by the day. But the IMF needed extra funds in order to be able to start intervening. The IMF depended heavily on extra US-contributions. As US-contributions require Congressional approval, this development propelled the American Congress into a powerful position with regard to both the banks and the regulators.

The U.S. policymakers in Congress soon realised that strengthening their domestic regulatory powers would be insufficient to safeguard the American financial system from another international financial crisis. By the early 1980s, the economic geography of the financial services industry had become decoupled from the political geography of U.S. bank regulation. High standards within the U.S. could not prevent a crisis from occurring elsewhere. Congress realised that any future financial crisis outside U.S. jurisdiction could easily harm the domestic banking system.[13] International standards were needed.

The central bankers of the Basel Committee, however, concluded in 1986 that it was still unlikely standard capital requirements would be introduced. Most regulators faced considerable opposition from the entrenched interests of their national banking industries. But not all, and the U.S. regulators decided to take a lead out of the impasse. They argued that there was a huge competitive disadvantage for U.S. banks with high standards, as opposed to other banks. This argument was well received domestically, and from that moment on, the issue of competitive inequality became so important that it became impossible to conceive of a policy solution that would separate the domestic regulation of U.S. capital standards from the ongoing regulatory efforts of the Basel Committee.[14]

The U.S. regulators sought an ally that would support this call for global action, and found it in the Bank of England. Together they reached an agreement, to

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from political control. This in effect gave the bank freedom to control monetary policy.

11 Quoted in Reinicke 1998, p. 105.

12 Reinicke 1998, p. 105.

13 Reinicke 1998, p. 107.

14 Reinicke 1998, p. 109.

which they invited others to join. Reinicke makes clear that this invitation was not as benign as it might seem, declining it would have had serious consequences:

> In essence, the United States threatened to project its definition of its own internal sovereignty onto other countries by calculating the capital standards of foreign banks in the United States on a consolidated basis and deciding whether they met U.S. standards and were thus eligible to acquire U.S. banking institutions.[15]

This threat of retaliatory action forced the Basel Committee into action. Failure to reach an agreement would undermine the reputation and the role of the Basel Committee. The committee tried to regain the initiative and imposed a deadline for the end of 1987, using the U.S.-U.K.-agreement as the basis.

The committee reached an agreement in December 1987, which, not surprisingly, was received critically in the domestic 'constituencies' of the central bank regulators. Even the US-Congress and banking world were not content. They had suddenly come to realise that the domestic competitive concerns of a few (politically) important banks could, under this new agreement, no longer be taken seriously by the other members of the Basel Committee. Any unilateral manoeuvring would be criticised by other regulators on the committee, but also by strong private sector opposition worldwide. Thus, the final version of the 1988 accord meant:

> ...the recognition that the world's finance is no longer carried on by separate national banking systems dealing with each other at arms 'length. It is dominated by multinational institutions that will soon have grown entirely beyond the reach of country-by-country regulation, unless the world's regulators can get together to enforce these kinds of rules.[16]

In the case of the Basel Committee, state based International Law practices have not provided the foundations upon which the Basel Accord has been built. Although created under the auspices of the Bank of International Settlements, the committee itself has no direct involvement of state representatives, nor has it been constituted by a treaty, and, finally, it does not have any legal standing.

Actors within the committee represented the national banks of the G-10 countries: Belgium, Canada, France, Germany (BRD), Italy, Japan, the Netherlands, Sweden, the United Kingdom, and the United States. The only other representative came from the national bank of Luxemburg. In theory each representative would have had the same capacities to influence the negotiations. However, given the fact that they had no mandate from their governments, they would have to negotiate not only with the other representatives, but also with their domestic political and economic constituencies. This made the process slow and tedious. The only change in the actor's capacities could therefore come from a change in the domestic political and economic situation. This happened when first the U.S.

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[15] Reinicke 1998, p. 110.
[16] Reinicke 1998, p. 112.

domestic climate changed, followed by the climate in the United Kingdom. Suddenly, the representatives of the U.S. and the U.K. were able to put the rest of the committee under pressure, and thus force an agreement.

The arena of the Basel Committee has been accessible to the representatives from the regulating domestic banks of G-10 countries and Luxemburg only. There has been no participation by other interest groups in the policy formulation stage, although they were affected by the policy outcome. According to Reinicke, the absence of other interest groups reflects the state of domestic policymaking in the arena of banking and finance.[17] The outcomes of the agreement were not exposed to the usual domestic public policy processes in the United States or elsewhere. This loss of accountability at the domestic level was not compensated for at the international level either.[18] Reinicke argues that this was not done on purpose:

> ...the post-war international institutional structure was built to accommodate an international economic system based on economic interdependence, which, from a public policy perspective, is best accommodated by facilitating intergovernmental relations and therefore did not have to be particularly concerned about its democratic attributes. The issue of the democratic deficit was rarely relevant, since most public policymaking remained within the boundaries of the national political economy.[19]

Reinicke holds that the presence of a democratic deficit, combined with the abstractness of the issue and the lack of transparency of the negotiations, helped to reach an agreement:

> This is not to say that the absence of accountability and transparency in global decision-making is necessarily a welcome development, but only that the presence of a democratic deficit contributed significantly to the timely conclusion of an agreement, and consequentially to the prevention of what many officials believed could have become a global financial crisis.[20]

The influence of the Basel Agreement soon began to spread beyond the original G-10 countries and Luxemburg to other financial markets. First, other countries, especially those with emerging financial markets, began to adopt the standards and to integrate them into their domestic regulatory and supervisory practices. This was followed by other financial institutions outside the G-10 who were pressured by their existing or potential customers to do so.[21] Thereby, and despite the democratic deficit and lack of nation-state based international legal foundations, the 1988 Basel Accord has become an effective new international regulatory arrangement.

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17 Reinicke 1998, p. 113.
18 Reinicke 1998, p. 114.
19 Reinicke 1998, p. 114.
20 Reinicke 1998, p. 114.
21 Reinicke 1998, p. 117.

Conclusion

This reconstruction of the developments resulting into the 1988 Basel accord has offered a first taste of the exploratory research conducted in this study. We have seen how under the auspices of the Bank of International Settlements (BIS), the central bank governors of the G-10 countries created the Basel Committee on Banking Supervision in 1974. This committee and the network of organisations and regulations that have been developed in relation to it, is not composed of states or constituted by a treaty, it does not have legal standing and it does not have a central headquarters. The committee has no means of actually making their agreements binding other than monitoring and peer pressure. Despite those 'handicaps' the Committee has been able to set regulatory standards for international finance which has had a profound impact on the availability of credit in the world's most important economies.[22]

What does the emergence of this, and other new arrangements for regulating International Relations, mean for the traditional body of International Law? In other words: what is the interaction between new arrangements for regulating International Relations and the traditional body of International Law?

[22] Slaughter 2004, p. 42-43.

1. International Law and New Regulatory Arrangements

> The transformation we are living through is a complex architecture with many distinct working elements, only some of which can easily be coded as globalization. Both self-evidently global and denationalizing dynamics destabilize existing meanings and systems. This raises questions about the future of crucial frameworks through which modern societies, economies, and politics (under the rule of law) operated: the social contract of liberal states, social democracy as we have come to understand it, modern citizenship, and the formal mechanisms that render some claims legitimate and others illegitimate in liberal democracies. The future of these and other familiar frameworks is rendered dubious by the unbundling, even if very partial, of these basic organizational and normative architectures through which we have operated, especially over the last century.[1]

1.1 Introduction

The American government could not solve the political and economic problems following the devaluation of the dollar in 1971. The impact of the decision to drop the Gold Standard was too large, too complex and too widespread. In fact, no government could have hoped to adopt adequate policies avoiding the ensuing global economic crisis that developed after this decision and the subsequent 'Oil Shock' of 1973. Within the financial world, especially within the banking world, the outlook was still very much a domestic outlook. But the birth-pangs of a global economy in the early 1970s meant that borders, and also financial borders, had become a little more permeable than they used to be. Coordination of banking practices was urgently needed in order to avoid the economic crisis to worsen. As states seemed unable, or unwilling to act, some banking supervisors did step up to the challenge and acted. The new committee's 1988 accord subsequently became a regulatory breakthrough in the coordination of international financial relations.

Changes like these are inevitable, but not always as radical. Sometimes there is a revolution, but most transformations are incremental. It is only when we look back that we realise that something has changed.[2] Most of the time, the outcome of change is harder to describe. This is certainly true in the field of International Relations. International Relations are infinitely complex and interconnected, changing one part affects every other part and may do so in any number of unforeseen ways. Thus we are not always able to present a clear picture of changes and their implications. The complexity of changes is often too large and we are left with some fuzzy notions of the implications, especially with regard to the regulation of International Relations.

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1 Sassen 2006, p. 2-3.
2 Sassen 2006, p. 11.

In addition, the context in which these changes are taking place has transformed significantly during the last two decades. Before the collapse of the totalitarian systems East and Central Europe in 1989 and the disintegration of the Soviet Union in 1991, the 'Order of Yalta' provided the context of our thinking about international law and international relations. Main characteristic of the Order of Yalta was the aim to maintain bipolar 'stability' between the two superpowers and their spheres of 'influence'. Initially, it was not quite clear what the dominant feature of the new reality of a post-Cold War world would be.[3] However, by the mid 1990s this new reality was identified as 'globalisation'. The concept itself reflected a widespread perception that the world was rapidly being moulded into a shared space by economic and technical forces and that developments in one region of the world could have profound consequences for the life chances of individuals and communities on the other side of the globe.[4]

In this new reality, alternative arrangements for regulating International Relations have emerged in addition to the existing body of International Law. These alternative arrangements seem to occur especially in policy-areas that are mostly affected by socio-economic globalisation processes.[5] Apparently these new arrangements, like the Basel Committee before, are providing a regulatory response to a regulatory need that was not being met by existing International Law. This relatively 'new' reality of globalisation provides the present context in which this study will set out to develop an understanding of the interaction between International Law and alternative regulatory arrangements in international economic relations.

1.2 Transformations and increasing complexities in International Relations

Generally speaking, International Relations refers to all interactions between state-based actors across state boundaries.[6] From the 1970s onwards there has been a more than exponential growth of non-state actor involvement in the field of International Relations that hitherto had been the almost exclusive domain of sovereign nation-states.[7] This can be illustrated by some figures. For example, in 1972 less then 300 NGOs attended the Stockholm Conference on the Human Environment, whereas in 1992, 1.400 NGOs registered with the United Nations Conference on Environment and Development in Rio. At the same time, more than 18,000 NGOs attended the parallel forum.[8]

During this period of more than exponential growth, non-state actors have also been able to increase their capacities to influence the process and content of International Relations.[9] Non-state actors have been able to expand their political

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3 A good example of the initial responses to and possibilities for a world beyond containment and division can be found in Alting von Geusau 1992.
4 Held 1999, p. 1.
5 See more: Chapter 3.
6 Evans 1998, p. 274.
7 Held and McGrew 1999, Nye and Donahue 2000, Josselin and Wallace 2001, Slaughter 2004, Friedman, Hochstetler and Clark 2005, Held and McGrew 2007, Sassen 2007.
8 Friedman, Hochstetler and Clark 2005, p. 36.
9 AIV 2006, p. 7-8.

repertoire, from the traditional lobbying of state-delegations at international conferences, to networking with state-delegations (occasionally resulting in NGO-representatives becoming part of state-delegations); and mobilising global public and political support through modern information and communication technologies. This broadening and intensifying of the political repertoire of NGOs, but also of multinationals,[10] has enabled non-state actors to occasionally set the international agenda and contribute to the creation of non-state dominated regulatory arrangements in International Relations. Sometimes NGOs are able to force other non-state actors, such as multinationals, to change their behaviour with regard to human rights or protecting the environment without any involvement of states or invocation of International Law mechanisms.

Take for example 'smart mob governance' as identified by Brugmann and Prahalad. In India, local NGOs attacked the Coca-Cola Company over its use of water in the village of Plachimada in Kerala. As accounts spread from Web site to Web site, the dispute grew into a worldwide battle over the brand's presence in universities and schools. The escalation of the campaign from market to market and from issue to issue has, as the Wall Street Journal recently reported, cost Coca-Cola "millions of dollars in lost sales and legal fees in India, and growing damage to its reputation elsewhere." By publicly inflicting harm to a market leader's reputation, which eventually forced the entire industry to change its practices, civil society is often successful in getting multinationals to conform to its norms.[11]

This is not to say that states seem to have become powerless in the wake of growing non-state capacities. Sometimes, an economically powerful state (such as the United States) or a conglomerate of states (such as the European Union) can enforce their national or internal rules on others without having any formal agreement or international treaty. They are in a position to 'export' their rules.

Slaughter offers a clear example of this method of regulatory export. The US Securities and Exchange Commission (SEC) has aimed for many years to disseminate the 'regulatory gospel' of US securities law. This included strict insider trading rules, mandatory regulation with a governmental agency of public securities issues; a mandatory disclosure system; issuer liability regarding registration statements and offering documents; broad antifraud provisions and government oversight. From the 1980s onwards the SEC actively pursued policies that reached out to foreign agencies to influence their national policies. According to a former SEC commissioner "The trick will be to encourage the securities regulators of the other major trading nations to develop arrangements that provide protections to investors substantially similar to those provided in this country." This was done through Memoranda of Understanding (MOUs) that were concluded between the SEC and their foreign counterparts. Through these MOUs a framework of cooperation and technical support was created that deliberately has set out to transplant features of U.S. securities regulation abroad. Every year hundreds of securities regulators from around the world are trained in the US, which, not

[10] Herz 2002.
[11] Brugmann and Prahalad (Rheingold) 2007.

surprisingly, provides them with a 'grounding in the basic principles and approaches employed by the SEC'.[12]

When it comes to the regulation of International Relations, we first and foremost tend to look towards International Law. International Law consists of those general applicable rules and principles that states and international organisations apply in their mutual relations and in their relations with natural or juridical persons.[13] These mutual relations consist of interactions in the political economy, law, and culture taking place between state-governments, their organisational and personal representatives, and the international institutions they have helped to create and maintain.[14] In other words, International Law is supposed to regulate the International Relations between sovereign states.

However, the emerging patterns of state and non-state interaction in International Relations are not always being regulated through existing International Law mechanisms. Occasionally, alternative regulatory mechanisms have been created, such as the Basel Accord. These new, at times fuzzy, regulatory mechanisms are often captured under the term 'Global Governance'.

Governance, according to the UN Commission on Global Governance, is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co- operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.[15] The term 'Global Governance' refers to specific multilateral arrangements of regulation and methods of management that encourage global interdependence and sustainable development.[16] It consists of those new emerging (alternative) regulatory arrangements that are not automatically part of the existing body of International Law.

This need to foster the growth of multilateral arrangements of regulation can be found across a wide spectrum of world-wide political challenges. When we focus ourselves on the socio-economic sphere, we find regulatory arrangements on a wide range of issues: from the regulation of international banking; to global warming, corporate social responsibility for the protection of human rights, and labour conditions in sweatshops. Apparently, each regulatory need has led to a different regulatory solution: the Basel Committee; the Kyoto-protocol; the Global Compact; the Fair Labor Association. Precisely the growth of alternative regulatory arrangements gives rise to questions concerning the relationship between those new regulatory arrangements in International Relations and the existing body of International Law.

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12 Slaughter (Raustiala) 2005.
13 Restatement (1987), para. 101.
14 Evans 1998, p. 274.
15 UN Commission on Global Governance 1995, accessed online at www.itcilo.it.
16 Evans 1998, p. 199.

1.3 Main question

The dynamics of International Relations continuously give rise to demands for new regulatory solutions. In this context, International Law has demonstrated an impressive capacity to adapt to changing circumstances and corresponding regulatory needs in International Relations. For example, when -in the wake of the Second World War- two superpowers had developed the capacities to wage an all out nuclear war, new international legal instruments were created trying to prevent such a war.[17] At the end of the Cold War, these instrument and systems of International Law had to function in a new context. The characteristics of this new context are that it is almost self-evidently global and thereby denationalises existing state-oriented meanings and systems.[18] At the same time, alternative regulatory mechanisms, of which the Basel Committee is only an early example, have been developed. In this context, the central question of this study focuses on the relationship between emerging (alternative) regulatory arrangements and the traditional body of International Law:

What is the nature of the interaction between new arrangements regulating International Economic Relations and the traditional body of International Law?

1.4 Sub-questions and further outline of this study

Sassen has argued that the transformation we are living through is a complex architecture with many distinct working elements. As mentioned above, the dynamics of globalisation and denationalisation destabilise existing meanings and arrangements. But not every new development arises ad nuovo, there is always some connection between a new architecture and what came directly before.[19]

This study begins by looking at the historical development of International Law. How has International Law in the past responded to emerging regulatory challenges? What elements are important for understanding new regulatory developments today? Secondly, as Sassen is keen to point out, there is not one specific response to new regulatory challenges, but a complex architecture of responses with many elements old and new:

> Foundational change in complex systems is a complicated matter. Such change is only partially legible and hence interpretation becomes critical in the account of that change.[20]

In order to explore this emerging complexity we will conduct some in-depth case-studies that might help to provide the necessary details for the interpretation of the otherwise fuzzy interactions between new arrangements for regulating International Relations and the traditional body of International Law. As a conse-

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17 See chapter 2.
18 Sassen 2006, p. 2.
19 Sassen 2006, p. 11.
20 Sassen 2006, p. 401.

quence, the main question has been broken down into 4 sub-questions that provide the further outline of this study.

1. What dimensions of the relationship between International Economic Relations and International Law have been important in the past during the creation of regulatory responses to emerging regulatory needs, and how can these dimensions help us to observe continuity and change? (Chapter 2)
2. What are the changing regulatory demands in International Economic Relations in the context of socio-economic globalisation, and how have these demands affected important of the relationship between International Law and International Economic Relations? (Chapter 3)
3. How can the important dimensions of the interaction between International Economic Relations and the traditional body of International Law be used to develop a conceptual framework to explore the developments and changes between emerging arrangements for regulating International Economic Relations and the traditional body of International Law in three specific case-studies? (Chapter 4,5,6 and 7).
4. What conclusions with regard to the interaction between new arrangements for regulating International Economic Relations and the traditional body of International Law between can be drawn based on an evaluation of the outcomes of the analysis of the three case-studies (Chapter 8)

Chapter 9 will present a summary of this study and its main conclusions on nature of the interaction between new arrangements for regulating International Economic Relations and the existing body of International Law.

2. Dimensions of Change and Continuity in the History of International Law

2.1 Introduction

This chapter sets out to uncover which dimensions of the interaction between International Relations and International Law have been important in the creation of regulatory responses to changing demands in the past. These dimensions will help us to create a framework to observe movement and change in current developments in the interaction between globalising International Relations and International Law.

There are many ways in which one can tell the story of the historical development of International Law. One of today's leading legal scholars, Antonio Cassese, distinguishes four stages plus a pre-stage. He locates the premise of International Law, the rise of the modern Nation-State, around the discovery of the Americas (1492) and the rise of Protestantism. He then proceeds to introduce four stages; stage 1: from the Treaty of Westphalia (1648) until the end of World War 1 (1918); stage 2: from the end of World War 1 (1918) to World War 2 (1939); Stage 3: from World War 2 (1939) until the end of the Cold War (1989); and stage 4: from the end of the Cold War (1989) until the present.[1] Another leading legal scholar, Malcolm N. Shaw, traces the early origins of International Law back to ancient Mesopotamia, and locates the rise of Modern International Law in 5 stages: stage 1: Middle Ages and Renaissance; stage 2: Westphalia (1648) as the start of Modern International Law; stage 3: 17th and 18th century; stage 4: 19th century; stage 5: 20th century.[2] Charles de Visscher, on the contrary, located the beginning of the new legal order in the plural legal system of the Middle Ages and especially with the beginning of the modern state under the Norman Kings of England after the Norman Conquest of 1066.[3]

However, the main concern of this chapter is not to describe the historic evolution of International Law, but to develop key dimensions for observing change and continuity using the history of International Law.[4] According to Sassen, the scholarship of earlier periods, with all its debates, produces a far more complex landscape than indicated by current models of social change:

> Detailed historical accounts and debates open up the range of possibilities. Looking at this earlier phase is a way of raising the level of complexity in the inquiry about current transformations. I am after a finely graded lens that allows me to disassemble what we have come to see as necessary aggregations...[5]

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1 Cassese 2005. Compare: Akehurst 1997.
2 Shaw 2005.
3 De Visscher 1968.
4 Sassen 2006, p. 28.
5 Sassen 2006, p. 11.

In order to observe movement and change, and thereby identify key dimensions that determine International Law's regulatory response to changing regulatory needs in International Relations, this chapter will focus on 'tipping points' in the historical development of International Law. Tipping points concern 'events', particular dynamics that led to practical or theoretical changes in International Law. There are two advantages to using 'tipping points'. The first advantage is that it keeps us from having to posit that the ascendance of new developments means the necessary end of the old order. The second advantage is that it keeps us from having to accept that International Law is still doing what it always has done and that not much has changed.[6]

This chapter will set out to explore the historical development of International Law at specific historical intervals. It will look at some of the political and economic dynamics at those intervals that demanded new international regulatory mechanisms, and the tipping point that subsequently occurred in practical responses of (or theoretical thinking about) International Law. The subsequent analysis of these tipping points in the second half of this chapter tries to identify key dimensions that can serve, using Sassen's metaphor, as 'graded lenses' to observe the developments in the interaction between International Law and alternative regulatory mechanisms in International Relations today.

2.2 Change and Continuity in the History of International Law

2.2.1 Introduction

There exists a strong tradition in International Law history that locates the origins of Modern International Law in the legal debates that started after signing the Treaty of Westphalia in 1648. However, even within this tradition there is no denial of the fact that Roman Law is one of the pillars of West-European legal history. However, there is no simple line of direct inheritance between the legal traditions of ancient Rome and modern international law.[7] Some have argued that 'Roman' elements have been derived from Roman private law.[8] This is supposed to have happened during the formative years of Modern International Law in the 17th century. Others have argued that Roman elements have reached us through the heritage of medieval Canon law. There is at least some continuity between medieval doctrines of the Ius Gentium and the early law of nations, although the medieval doctrines were a mixture of private law, Canon Law and Roman Law .[9]

We will begin by looking at the – sometimes confusing[10] – meanings of '*Ius Gentium*' in Roman law. The reason for this confusion is that most Roman laws fell

6 Compare Sassen 2006, p. 9.
7 Bobbitt 2002, p. 357.
8 See for instance Shaw 2005, p. 412. Lauterpacht advocated this idea in 1927 with the publication 'Private Law Sources and Analogies of International Law (With special reference to International Arbitration).
9 Lesaffer 2002, 2005, p. 34.
10 Lesaffer 2005, p. 35.

into disuse with the disintegration of the Roman empire and were 'rediscovered' in the Middle Ages.[11]

One of the most important Roman authors for the European legal tradition is Marcus Tullius Cicero (103-43 BC). At the time of the Late Republic, the strong army legions of the Roman Republic were subduing Gaul (58-50 BC) and finishing the conquest of the Mediterranean. It is in this specific context that Cicero speaks of International Law as '*ius belli atque pacis*', the law of war and peace.[12] War was considered to be a legitimate way of conducting state relations.[13] This specific link between law and war has led later philosophers and historians to argue that International Law is, by definition, founded on the constitutionalisation of violence.[14] In Cicero's time, the words '*Ius Gentium*' were used to refer to a system of 'universal private law'. Within this *Ius Gentium*, was *a Ius Civile*, namely the civil law in so far as Roman citizens had to deal with foreigners, i.e. non-Roman citizens.[15]

During the last hundred years of the Roman Republic, foreign campaigns of conquest became entangled in a series of 'domestic' civil wars. Successful generals sought to control the central government of Rome.[16] With the end of the Republic looming on the horizon, a new understanding of Rome and its conquered territories was born: the Roman Empire.

This idea of empire called for new understandings of the regulation of the relations between the citizens of Rome and the conquered nations. The writings of the historian Sallust (86-34 BC) reveal a glimpse of the changing understanding of Roman Law with regard to its subjects. Sallust started to use the concept of '*Ius Gentium*' when referring to laws governing the economic relations between organised peoples.[17] This empire of the '*populus Romanus*' came into being in 31 BC when Octavianus defeated the last Mediterranean opposition to Roman rule, Egypt, and assumed the title of 'Augustus.'

Two hundred years later, Gaius (130-180 AD) introduced a new systematisation of the technical highly sophisticated but very complex body of law of the Roman Empire: the *Institutiones*.[18] Gaius defined *Ius Gentium* thus:

> The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. The rules established by a given state for its own members are peculiar to itself, and are called Ius Civile: the rules constituted by natural reason for all are observed by all nations alike, and are

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11 Davies 1997, p. 173. However, Canon Law was largely founded on Roman Legal traditions.
12 Kaser 1993, p. 25, Ziegler 1994, p. 61.
13 Kaser 1993, p. 29.
14 Bobbitt 2002.
15 Lesaffer 2005, pp. 35-36.
16 Davies 1997, p. 155-156.
17 Kaser 1993, pp. 23-24.
18 Miller 2000, p. 447.

> called Ius Gentium. So the laws of Rome are partly peculiar to itself, partly common to all nations...[19]

However, when in AD 212 all free inhabitants of the Roman Empire became citizens, the distinction between the *Ius Civile* and the *Ius Gentium* lost its practical importance and the two systems became increasingly intermingled.[20] This 'new' *Ius Gentium* became the common law of the Roman Empire and was deemed to be of universal application.[21]

It is from this Roman heritage that St. Augustine of Hippo and St. Isidiore of Seville developed some of their understandings of 'the law of nations' which helped to inform medieval debates on International Law. These medieval debates, in their turn, provided some of the foundations for Modern International Law.

2.2.2 The Concept of Ius Gentium in the Early Middle Ages

In the time following the definitive East-West division of the Roman Empire after the death of emperor Theodosius (395), and the fall of Rome in 410, St. Augustine (354-430) formulated some initial, and largely implicit, ideas on International Law. Living in politically and military unstable times, he sought ways to limit both the resort to war, and the conduct of war itself.[22]

A century later, the emperor Justinian (r. 527-65) tried to restore the imperial rule over the lost Western provinces of the Roman Empire. The Emperor also set out to codify Roman Law. Yet, this restoration was not to last. Soon after his death, Italy fell prey to a new wave of invaders, the Lombards.[23] Yet, during that diffuse and political unstable period, St. Isidore of Seville (560-636) used the phrase "the law of nations"[24] to describe the common customs of peoples relating to relations among nations in an international order:

> It is called the Right of Nations since all nations,[25] more or less, observe it...[26]

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19 Gaius cf. Wittuck 1904, §1, p. 1.

20 Lesaffer 2005, p. 36.

21 Shaw 2005, p. 17.

22 For an example of this implicitness, see Book 22 of the *City of God*, where St. Augustine discusses just and unjust wars.

23 Davies 1997, p. 244.

24 This interpretation of 'Ius Gentium' differed from the use of in earlier Roman Law when it was used to describe the institutions of civil law which they supposed all peoples naturally respected Kelly, 1999, p. 111.

25 The nation St. Isidore spoke of can not be compared to modern-day nation-states. It seems more likely he referred to a community of people, aware of themselves as history has made them. See section 4 of this chapter.

26 There is a problem with this translation of "Ius Gentium" by O'Donovan and O'Donovan. Whereas this term in theories of International Law is being translated as "law of nations", the translation quoted here, based on a classical reprint edited by W.M. Lindsay (Oxford Classical Text) 1911 uses the term "right of nations" which is highly unusual. The Latin Text reads: 'Ius Gentium est sedium occupatio, aedificatio, munitio, bella, captivitates, servitutes, postliminia, foedera pacis, indutiae, legatorum non violandorum religio, conubia inter alienigenas prohibita. Et inde Ius Gentium, quia eo iure omnes fere gentes utuntur.' The au-

The Right of Nations is: the occupation of sites, the construction of buildings, armament, war, captivity, enslavement, the right to return to one's home, peace treaties, truces, the sacrosanct inviolability of ambassadors...'[27]

According to Kelly, this list contains 'a series of matters which in fact are more or less the scattered timbers out of which the Renaissance world and ultimately Grotius constructed modern International Law'.[28]

During the subsequent centuries, until the end of the Viking invasions in Western Europe, each nation/tribe carried its own law system, while some clung to a distant dream of 'one Europe' that could carry on the legacy of the Roman Empire (including a shared concept of law).[29] On the one hand there was the notion that belonging to a specific tribe determined the law that one could be judged under, on the other hand there were clear attempts to formulate a law common to all tribes, a *Ius Gentium*.

With the end of the Viking Age, a new dynamic was brought into Western European society and its regulatory needs. Merchants established in Baltic and North Sea ports started working closely together to ensure protection and continuing trade. The first commercial association, called a 'hansa', was established at Wisby on the island of Gotland in 1161 under the name 'United Gotland Travellers of the Holy Roman Empire'. Within a century, an extensive confederated network of 'free-cities' had been developed that stretched from the Atlantic to the Gulf of Finland. The Hanseatic League comprised a series of constituent leagues, whose delegates met regularly to co-ordinate policy. It reached the peak of its influence in the 14th century.[30]

Yet, we should not forget that at the same time important aspects of international relations that were discussed by jurists involved arguments from both Roman law and canon law:

> Canon lawyers more often addressed subjects relevant to the law of nations that Roman Law did. Canon Law had a greater impact than Roman law because it was the applicable law of the ecclesiastical courts, which – ratione peccati – held jurisdiction in many disputes between princes and body politics.[31]

As a consequence, we can detect the influence of these emerging international trade regulatory mechanisms and Canon law in medieval thinking about the law

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thors of the translation used here, use the phrase law of nations when referring to this passage and somehow do not seem to notice that "law" and "right" are different.

27 Seville 630, p. 210.

28 Kelly, 1999, p. 111. He seems to forget the importance of the Early Spanish School here.

29 Van Caenegem points out that the Carolingian empire of Charlemagne was clearly an attempt, and also perceived as such, to build once again a vast supranational home for the peoples of the European continent. As such the project, although short-lived, tried to break with the tribal outlook and law systems of the Franks and other peoples (Van Canegem 1995, p. 44).

30 Davies 1997, p. 340.

31 Lesaffer 2005, p. 36.

of nations. When Rufinus the Canonist (1150-1191) wrote about the scope of *Ius Gentium*, he included trade as an important element. He observed that people consulted each other on matters of mutual interest such as trade and war. Economic consultations were included because:

> they are used by almost all peoples in that there are sales, contracts of letting, and hiring, exchanges and other such things.[32]

The need to regulate international trade, in addition to the regulation of war and peace, completed the medieval understandings of *Ius Gentium*. It is a list that is still recognisable today.

2.2.3 The Concept of Ius Gentium and St. Thomas Aquinas

The late 13th and the early 14th century provided the breeding ground for numerous municipal blood-feuds on the one hand, and for Europe's first merchant bankers on the other hand. At that time international politics in Europe revolved round the triangle of rivalries between the Holy Roman Empire, the Papacy, and the kingdom of France.[33] Meanwhile, the new bankers' methods of double-entry book-keeping laid the foundations for modern accountancy and modern capitalism.[34]

It was in this turbulent context of feuds, wars, overlapping jurisdictions and emerging capitalism that St. Thomas Aquinas (1225-1274) was born at the family castle at Roccasecca. His studies and work took him to Naples, Cologne, Paris, Rome, Orvieto, Viterbo, Paris and Naples again, before dying at the age of 49 at the monastery of Fossanova (only 20 kilometres from Roccasecca).[35] While teaching at the Dominican Studium at Santa Sabina in Rome in 1268, Aquinas started to work on the *Summa Theologiæ*. It is in this work that we find some important insights into St. Thomas' understandings of *Ius Gentium*.

In his discussion of the division of human laws, Aquinas engages with the work of St. Isidore of Seville. In Thomas' understanding *Ius Gentium*[36] was a category of law to be inserted somewhere between the underlying precepts of natural law and any given body of positive law: Natural law gave the universal *bonum et æquum*, civil law the rules for one community, the *Ius Gentium* the laws generally observed:

> Those precepts belong to the Ius Gentium which are drawn like conclusions form the premises of natural law, such as those requiring justice in buying and selling and so forth; without which men cannot live sociably together; this last

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32 Canonist 1159, p. 299.
33 Davies 1997.
34 Davies 1997, p. 402.
35 McInery 2004, p. 3.
36 In the authorative Blackfriars translation of the Summa, Gilby warns that Thomas' use of 'Ius Gentium' should "better be not translated 'the law of nations." But Gilby does not give specific reasons why this should not be done. Gilby 1963, p. 110.

> is a condition of natural law, since, as it is shown in the Politics, man is by nature a sociable animal. Constructions, however, put upon natural law are proper to civil law, and here each political community decides for itself what is fitting.[37]

Ius Gentium in Thomas' opinion should be distinguished from natural law. More importantly, *Ius Gentium* should be reasonable:

> The Ius Gentium is indeed natural to man in the sense that he is reasonable, and it is reasoned out like a conclusion from principles, without being far-fetched, hence men may reasonably agree about it. Nevertheless it is distinguished from natural law, very much so from the natural law which is common to all animals.[38]

Despite the apparent practical content of *Ius Gentium*, on which St. Thomas seems to agree with earlier writers, his remarks on the origins of *Ius Gentium* open up a new dimension in the historic development of International Law. It seems that some laws, those that are part of the *Ius Gentium*, do not derive there authority from a tribe, empire or contacts between nations, but they derive their authority as a reasonable conclusion of principles.[39] This use of 'reasonableness' needs some explanation, because it should not be confused by later appeals to 'Reason' during the era of the Enlightenment.

Aquinas holds that decisions, choices (*electio*) are essential to human action. These choices spring from deliberations (*consilium*) by people over what is to be done. To describe these choices and decisions is to state what our choices or decisions have amounted to. Particular choices or decisions are the result of moral reflections on concrete experiences by persons.[40] Human action, including law making, thus becomes 'a doing in light of alternatives'.[41] As a consequence, there exists a close interaction between law and its socio-political and socio-economical context, because '[human] law exists derivatively in the behaviour it regulates.'[42] In this way law, *Ius Gentium*, is the result of moral reflections on concrete experiences by persons.

In conclusion, the writings of St. Thomas added another dimension to the medieval understandings of '*Ius Gentium*'. It introduced 'reasonableness', based on moral reflection on practical experiences, as a founding element of law. It was from the this legacy of writings of St. Augustine, St. Isidore, and St. Thomas, that lawyers during the Renaissance were able to lay the foundations for modern International Law.

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37 Aquinas, ST. Ia2ae, 95,4.
38 Aquinas, ST. Ia2ae, 95,4
39 In Thomas' time these would have been the principles of the Christian Gospel
40 ST. I a2ae 97. 3. See also: Alting von Geusau 2000. Compare this approach also to the approach of Charles de Visscher in section 2.3.3.
41 Davies 2002, pp. 122-123.
42 ST. I.90.I.

2.2.4 The Concept of Ius Gentium at the Beginning of the Renaissance

There are several reasons to mark the end of the fifteenth century as a significant turning point for the concept of International Law. In 1480, without a warning, the Ottoman Empire landed troops near the city of Otranto in Italy and sacked it. It was a clear warning that an empire outside Christendom was looking for political dominion of substantial parts of Europe. The discovery of the Americas in 1492 and the dealings of Western colonisers with non-Christian cultures, presented also new problems that resulted in reasoning about the universal rights of peoples. The French invasion of Italy in 1494 marked another historic turning point from which nations like Spain, France and England for the first time stand forth as full-grown personalities.[43] The rise of these nations characterised the process of the creation of territorially-consolidated independent units in theory, doctrine, and fact.[44] The Siege of Vienna in 1529 by the Ottoman Empire ensured not only the awareness of a world outside Europe, but also that this world would not be necessarily subjected to European, Christian, rulers.

Meanwhile significant religious upheavals were taking place within European Christendom. In 1517, Martin Luther nailed a copy of the *95 Theses* to the door of the Castle Church at Wittenberg, thereby starting the protestant Reformation. This was followed in 1534, by the conflict of the English King Henry VIII and his subsequent break away from the Catholic Church in 1534 through the Act of Supremacy. By 1541 the followers of the reformed theologian Calvin were ruling Geneva. In 1566, poor and hungry Dutch farmers started the first of a series of rebellions against Spanish rule by plundering the church of Steenvoorde.

In this dynamic context, old concepts and authorities were rapidly loosing their control and political significance. New concepts and regulatory solutions were needed.[45]

Lawyers from the Early Spanish School like Vitoria (1483-1546) and Suarez (1548-1617) developed their ideas in reaction to the Spanish conquest of the Americas. Vitoria, writing for the Spanish Inquisition,[46] introduced the notion of *ius inter gentes*, which then enabled Suarez to write that *Ius Gentium* was not imposed by the natural law (although it could be deduced from it) but by universal positive law, from the 'habitual conduct of nations' within a global moral juridical community and thus a *ius inter gentes* in which all nations are part of a 'Corpus Mysticum under God'.[47]

Thomas Hobbes (1588-1679) did not agree with the existence of this *corpus mysticum*, and held that International Law, maintaining peace or a *status quo*, was the

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43 Kelly 1999, p. 200.
44 Shaw 2002, p. 18.
45 See for instance the intense debates over the justifications for the Franco-Spanish War of 1635 when traditional doctrines seemed no longer applicable and the traditional authority of the Pope to deal with such issues was no longer accepted. More on this: Lesaffer 2006.
46 Shaw 2002, p. 20.
47 Suarez 1612.

only way to prevent states preparing for or going to war, of all against all in which life would be 'solitary, poor, nasty, brutish, and short'[48] In relation to the absence of a common power in International Law, like the 'Corpus Mysticum' of Vitoria, or the teachings of the Church before the Reformation, Hobbes doubted that one could find common understandings of justice or International Law.

In this case, the historical animosities between Roman Catholic Spain and Tudor/Elizabethan Protestant England prevented the exchange of ideas between the Spanish School and the British philosophers. In fact, they would have perceived each other as mortal enemies. Thomas Hobbes was born on April 5th 1588, prematurely, supposedly precipitated by his mother's hearing about the Spanish Armada. His patrons throughout his life where the Cavendish family who fostered a Venetian anti-Spanish interest in England. While in exile in the 1640s, he became disenchanted with the Church of England and wrote *Leviathan*, which set out the secular ruler's independent authority in civil matters.[49]

In Spain, Francisco Suarez was the leading political philosopher of the Counter Reformation. He closely followed in the footsteps of Francisco Vitoria (1483?-1546), reviving the Aquinas legacy that prevailed during the Council of Trent, and subsequently Roman-Catholic philosophy in general. In 1612 Suarez published *A Defence of the Catholic and Apostolic Faith against the errors of the Anglican Sect*, in which he argued that the English people, as a corporate body, and led by their constituted authorities, had a right to resist the heretical king James I.[50]

Hobbes, however, despite his critique of the monarchy, became more committed to uphold the crown's authority against its critics from the 1630s onwards. He would therefore have opposed any argument by an enemy of England against the rights of the crown, or any Spanish argument on any other matter, such as International Law:

> Considering the offices of one sovereign to another, which are comprehended in that law, which is commonly called the law of nations, I need not to say anything in this place; because the law of nations, and the law of nature is the same thing. And every sovereign hath the same right, in procuring the safety of his people, that any man particular man can have, in procuring the safety of his own body. And the same law that dictateth to men that have no civil government, what they ought to do, and what to avoid in regard of one another, dictateth the same to commonwealths, that is, to the consciences of sovereign princes and sovereign assemblies; there being no court of natural justice, but in conscience only, where not man; but God reigneth...[51]

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48 Hobbes 1651, p. 143.
49 Miller 2000, p. 210-211.
50 Miller 2000, pp. 508-509.
51 Hobbes 1651, p. 309.

In this transition period from medieval to modern thought on International Law, the 'international'[52] problems did not change much. But the shared Christian ethical understanding between nations, that could have enabled them to address issues within a shared framework of understanding, had been lost. And the territorial scope of the law had changed through the discovery of new parts of the world. Finally, there had been a change in the subjects: the development of the first 'generation' of nation states, meant that 'nation' became more and more a political definition, referring to government and territory. At the same time, International Law remained confined to the small group of European Christian nations.[53] But, the notion of 'peoples' now also had to account for non-Christian peoples as well (Vitoria).

2.2.5 Grotius and the Foundations of Modern International Law

It was the Dutchman Hugo Grotius (1583-1646) who set out a concept of International Law that seems to dominate our understandings of the law today. Although his doctrine is still influential, it should not be forgotten that Grotius argued first and foremost to support the interests of the young Dutch Republic. For instance, Grotius opposed the 'closed' seas concept of the Portuguese. Shaw remarks, 'parenthetically', that Grotius theory happened to accord nicely with prevailing Dutch ideas as to free trade and the needs of an expanding commercial empire.[54] In a way, Grotius paved the way for the idea that the acceptance of a shared Christian heritage was no longer needed for states in order to be bound by International Law. Grotius held that International Law did apply to those who held that God did not exist, and to those who 'based on natural reflection and unbroken tradition', like Grotius himself, believed in the opposite.[55] Grotius words on the hypothetical absence of God: *etiamsi daremus Deum non esse*, were taken up by younger intellectuals who aspired to found a moral science that would be valid independently from God, leading the way for a philosophy that became known as 'Positivism'.[56]

The start of the modern period of International Law, did not create a great change in the sort of problems that needed international regulation, only the scale changed: from Europe, to the Americas, Africa and Asia. The subjects of International Law became limited because of the rise of the nation-state. International Law became the law between nation-states. Individuals and peoples were now considered to be subject to the king/prince, who represented them, and the rest

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52 One must bear in mind that 'International Law' still remained largely a West-European affair.

53 Röling 1964, p. 178.

54 Shaw 2002, p. 21.

55 Grotius 1615, p. 794.

56 O'Donovan 1999, p. 788. This makes Grotius in some interpretations, based on this assumption, the father of modern secular International Law. However, that interpretation does not seem to do justice to Grotius' works. Reading *Prolegomena* it looks like it is more appropriate to speak of Grotius as being the last writer who wrote in the theological and rationalist traditions of the previous centuries.

of the community, on behalf of the nation-state. The expansion of the scale of the law thus brought a limitation of the subjects of International Law.

In conclusion, the roots of modern concepts of International Law, which still support contemporary understandings of International Law, developed in response to practical challenges of regulating International Relations. It seems that actual capacities to physically determine the borders of states (technological invention), the scale of warfare (The Religious wars of the 16th century that spanned almost all of Europe) and the discovery of, and trade with, the Americas (enhanced by better technologies for navigating and mapping) significantly affected the development trajectory of International Law. On the one hand this development demonstrated the law's ability to enlarge the scope to address international issues. On the other hand, the number of participants, subjects, had been narrowed down to sovereign kings and princes, which might have lessened the decision-making processes.

2.2.6 The Expanding Law of Nations

The pre-modern era formulated a law of nations without the existence of nation states. The Modern era started with the conception that the law of nations was created by the free consent of a few nation states in Europe.

Between 1648 (Westphalia) and 1815 (The Congress of Vienna), International Law extended towards all Christian nation states in Europe and beyond, including Russia and the newly founded United States of America.[57] In this period, the Sovereign as a Person slowly moved behind the image of the Sovereign State. One of the reasons for this move seems to have been the development of accurate technical tools that enabled better navigation and better map-making.[58] A new, more accurate, picture of the world emerged, which included the precise definition of the borders between the various states.[59]

In the meantime, the developing international community was faced by the "Oriental" question, which refers to the question of whether non-Christian nation-states, such as the Ottoman Empire and China, could enter the hitherto Christian International Law system? The practice of nation-states answered this question affirmatively with regard to the Ottoman Empire, starting with the Ottoman-Austrian Treaty (1771) and the Ottoman-British Treaty (1799). According to Ziegler, the Ottomans became fully accepted as part of the European International Law system after the end of the Crimean wars. China, on the other hand, was less inclined to join this, as far as Chinese leadership was concerned, barbaric system.[60]

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57 Ziegler 1994, p. 181.

58 On the importance of map-making and other inventions for the success of nations see: Landes 1998.

59 Ziegler 1994, p. 181.

60 Ziegler 1994, p. 209. Although China had some trade relations, notably with the Dutch, since the 17th century. After losing the Opium wars with Great Britain in 1842, China had to surrender the city of Hong Kong and accept the establishment of diplomatic relations with

After the French Revolution, the French Empire, and the battle of Waterloo leading to the downfall of Napoleon, the nations of Europe signed the Treaties of Paris (1815) in which a Holy Alliance was created of 'Christian nations' that sought to prevent the future need for an all-out European war. Furthermore, it created an anti-revolutionary military alliance between some members that would intervene against liberal and nationalist uprisings that could pose a threat to the established European order.[61] International Law thus responded to the fears of a power imbalance on the European continent and the threat of popular uprisings. But there were more problems that needed regulation.

By the mid 19th century, the industrialisation of organised warfare was beginning to show in the large numbers of casualties. The international concern over this growing number of casualties needed a political answer. The 1864 Convention of the International Committee of the Red Cross, founded by Henri Dunant as a private law association under the laws of the Canton of Geneva in 1863, came as a response to the experiences of the Crimean war (1853-1856), the battle of Solferino in 1859, and the lessons from the first 'modern' war: the American Civil War. The number of casualties during this war was enormous on both sides: Union losses were 359,528 dead and 275,175 wounded; Confederate losses were estimated at 258,000 dead and 225,000 wounded.[62] Given the scale of the wars and their disastrous effects, limits came to be formulated with regard to the use of force. In the first place to protect civilians, and, in the second place, to limit or camouflage the dehumanising character of modern warfare.[63] Humanitarian laws of war, became the first stepping stones for the recognition of human dignity in International Law.[64] In fact, this recognition of human dignity in International Law became the necessary pre-condition for the recognition of individuals as subject of International Law that developed in the wake of the First and Second World War.[65]

2.2.7 Developments in International Law during the First Half of the 20th Century

By 1919, at the end of the First World War (1914-1918), the failure of the old peace and security systems of the 'Christian nations' had become evident. New institutions to preserve and secure peace were necessary. Furthermore, the First World War had united the world, in a sinister way. For the first time in history, a European conflict assumed such a magnitude that it involved all major members of the international community, it became difficult for states to keep aloof from what was happening in other areas of the world.[66] In the aftermath of the war, the

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the West through the exchange of diplomats (Ziegler 1994, p. 219).

61 Malanczuck 1997, p. 11-12.

62 Malanczuck 1997, p. 21.

63 Hirsch Ballin 1995, p. 10.

64 Hirsch Ballin 1995, p. 11.

65 In 1868 the first convention on the prohibition of light projectiles that explode after entry into the body of a victim was signed. The Hague Peace conferences of 1899 and 1907 prohibited the use of dum-dum bullets and the use of poison gas during the First World War led to a prohibition through a protocol in 1925 (Hirsch Ballin 1997).

66 Cassese 2001, p. 30.

League of Nations was formed. The first purpose of the League of Nations was the promotion of international cooperation and the achievement of peace and security by the acceptance of the parties, in principle, of 'obligations not to resort to war' (the absolute right of states to go to war was not intended to be excluded all together). The other purposes of the League included promoting disarmament and open diplomacy to abolish the practice of secret treaties, the mandate system and responsibilities with social matters, such as health and fair labour standards.[67] The number of recognised subjects of International Law was extended to include non-European and non-Christian nations as well. The League of Nations was open to countries from all continents of the world. The subjects of the League were considered to be 'civilised nations'.[68]

That same year, the International Labour Organisation was created by the members of the League of Nations in response to political and ideological pressure of socialist doctrines, and also because it came to be believed that the condition of workers was growing worse, and that therefore the lot of workers deserved greater international concern.[69] Finally, in 1921, the Permanent International Court of Justice was created as a result of the belief among states that arbitration was the best means of settling disputes and preventing the outbreak of wars.[70]

At the same time, important steps for the recognition of individuals as subjects of International Law were taken. Religious, ethnic and linguistic minorities could submit petitions to the Council of the League of Nations. Trade union associations could file complaints with the ILO governing body.[71] Non-state actors, like unions and minorities, started to play a small role in International Relations.

However, these newly-created institutions could not prevent the outbreak of the Second World War, and some of them, like the League of Nations, would not survive the war. In 1945, the failing League was succeeded by the United Nations Organisation, which tried to remedy many of the defects of its predecessor. Initially, its members were described as the 'peace loving nations', but this criterion was soon dropped.[72] Currently, the UN General Assembly consists of 191 member states. Furthermore, the horrors of the Holocaust were to prove instrumental for a stronger recognition of the individual as subjects of International Law. First of all, the Neurenberg and Tokyo trials expanded the obligation of states to include not only the human treatment of enemy soldiers and civilians, but also the human treatment of a state's own population.[73] These trials recognised individual responsibility under International Law without the usual interposition of the

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67 Malanczuck 1997, p. 23-24.

68 Röling 1964, p. 178. Not all nations became part, and the scope remained limited to the European continent and its colonies. Significantly, the United States abstained from joining the League.

69 Cassese 2001, p. 15-16.

70 Cassese 2001, p. 34.

71 Cassese 2001, p. 35.

72 Röling 1964, p. 178.

73 Hirsch Ballin 1995, p. 12.

state.[74] Secondly, the Universal Declaration of Human Rights set out the shared intention of states to defend, protect and preserve human dignity. The next steps for the recognition of individuals as subject of International Law can be found in the accessibility to civilians of supervisory procedures at the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court for Human Rights, and the Committee mentioned in the optional protocol of the International Covenant on Civil and Political Rights.[75]

2.2.8 Conclusion

In this first part of the chapter we explored some of the tipping points in the historical development of International Law. We have encountered tipping points with regard to the theory of International Law and to the practices of International Law.

It seems that much of the interpretation of what International Law is depends on specific historical conditions in International Relations. During politically unstable times much of the focus of International Law is on the conduct of warfare and the treatment of prisoners, combatants, and civilians. In more stable times, the focus shifts to diplomatic and economic relations. Later on we see that economic concerns and military concerns are seen in a more integral way. Thus the League of Nations and the ILO were created at the same time to address the challenge of peace after the First World War. Or new developments are the result of a massive shock to the public mind: hence the creation of the Universal Declaration of Human Rights in the wake of the Second World War.

The focus of International Law furthermore depended very much on the specific position of the author at that specific time. Thomas Hobbes could not, and would not, build on the Spanish School of thought because of the political animosities between Catholic Spain and protestant England. Grotius argued very much in the trading interests of the Dutch Republic.

At the same time we have seen how medieval legal thinking identified many of the concerns of International Law that we can still recognise today. In that respect, the rise of the nation state was less influential on the content of International Law (War, Diplomacy and Trade) than on the specific political and regulatory organisation (Westphalia 1648, Concert of Vienna 1815, United Nations 1946) of International Relations.

Over time the number of entities of International Law has not just expanded horizontally to embrace all states as subjects; it has also extended itself towards individuals, groups, and international organisations. However, this latter movement did not bring these participants in International Relations to the same 'subject'

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74 Shaw 2002, p. 38.
75 Hirsch Ballin 1995, p. 14.

level as the states, because they could not take part in processes through which states would bind themselves to international rules.[76]

The second half of this chapter will now begin by trying to identify some of the key dimensions of International Law that we can use to observe movement, change and continuity.

2.3 Historical Assessments

The study of tipping points in the historical development of International Law revealed close connections and interactions between (international) political developments and movement and changes in International Law. The following analysis of change and continuity in International Law is based on historic works by leading legal scholars of their day. All three share, contrary to Hans Kelsen, that there is no such a thing as a pure theory of (International) Law, but that the study of International Law theory should always take into account the politics of International Relations.[77]

Two scholars wrote their assessments while occupying chairs in International Law and International Relations at the London School of Economics, Lauterpacht and Schwarzenberger; while De Visscher at the time of publishing his book was the leading French-speaking Belgian scholar on International Law, having served on as President of the Institute for International Law and as judge of the International Court of Justice.

All three authors have identified dimensions for observing movement, change, and continuity in International Law. This particular section will identify for each author those key dimensions. The next section, 2.4, will analyse all dimensions mentioned in this section in order to identify a list of key dimensions that could be used to create a framework for observing movement, change, and continuity in the interaction between emerging regulatory arrangements in International Relations and the existing body of state-based International Law.

2.3.1 Lauterpacht: The Function of International Law in the Community

After the First World War, the study of International Law and International Relations initially became influenced by the strong utopianism of Woodrow Wilson and the creation of the League of Nations. This utopianism (also called Wilsonianism) relied heavy on concepts of social analysis rooted in the tradition of the Enlightenment. It argued that one should always look for reason-based substitutes for war. One of its claims was that the First World War could have been pre-

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[76] Meijknecht notices that these new entities, whose existence in the international realm could not be wished away, were labelled 'beneficiaries' or 'objects' of International Law (Meijknecht 2001, p. 47). This has led to an unhelpful dichotomy between subjects and objects of law in theory, which does not capture the complexities and nuances of International Relations.

[77] Green 1992, Knutsen 1997, Dupuy 2000.

vented if only a forum had existed in which the grievances before the Balkan conflict had been discussed by the national leaders of each party involved. [78]

However, by the beginning of the 1930s, scholars started to transcend this "orthodoxy of legal idealism" and proposed to study international events in the light of history and interstate relations.[79] It is within this specific context that Hersch Lauterpacht sets out his careful argument that although law is essential for a peaceful world, it is no panacea. In "The Function of Law in the International Community" (1933), he writes:

> Just as positivism in the domain of International Law has become unscientific by being driven through its own exaggerations, to disregard the very practice of States which it professes to regard as the only source of law, so the desire of generations of lawyers to confine their activity to a registration of the practice of States has discouraged any determined attempt at relating it to higher legal principle, or the conception of International Law as a whole.[80]

Unlike municipal law which is based on subordination of persons to a legal rule, there is in International Law no superior which imposes law. So what gives International Law its legal nature? In Lauterpachts time, the popular answer to that question was to refer to the doctrine of co-ordination: starting with all sorts of conventional so-called social and conventional rules between States, only sanctioned by social compulsion, these rules grow – in the long run – into general customary International Law. What could have provided for the basis of co-ordinated customary International Law or ensured the binding force of this customary International Law? Lauterpacht answered that, while within the State the relation of the law to the individual is one of command imposed regardless of the will of the person, in international society it is based on the voluntary acceptance of legal obligations.[81] From this doctrine two theories could be developed with regard to the basis of international obligation. One is the doctrine of auto-limitation; the other, the theory of law-making agreement as a source of International Law.

Lauterpacht noted that the branch of doctrine of auto-limitation in the end could lead to the clear repudiation of International Law.[82] The reason for this being that this theory treats the observance of rules of International Law not as a matter of legal obligation, but as the result of calculation – which may or may not take the long view – of the compatibility of the observance of the obligation with the interests of the State.[83] The other branch, the theory of law making-agreement finds the basis of International Law in the "common will" of States, which by means of 'agreement', not a contract, constitutes a 'common will' resulting from a combination of wills. This merger of individual wills of State constitutes a binding rule

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78 Knutsen 1997, p. 217.
79 Knutsen 1997, p. 217.
80 Lauterpacht 1933, p. 438.
81 Lauterpacht 1933, p. 408.
82 Lauterpacht 1933, p. 415.
83 Lauterpacht 1933, p. 411.

of law, because the common will of States cannot without violation of the law be changed by a single State:

> Thus: although the will of State is essential for the creation of the common will, it is the latter, and not the will of the individual State, which is the source of international obligations.[84]

This doctrine, first developed by the German jurist Triepel provided the Positivist writers with their main argument to answer questions with regard to the legally binding nature of International Law.

Lauterpacht then sets out to answer the main concern of his book, whether States should accept the work of international tribunals. From the rule that obligations of International Law owe their origin to the will of States, it follows that new obligations cannot be imposed upon an unwilling State by any international legislature. From the principle that a State is objectively bound by an obligation once undertaken, follows the juridical postulate of the obligatory rule of law through the instrumentability of courts. According to Lauterpacht international tribunals do not impose new obligations, they only ascertain existing law. They give effect and expression to the will of State by ascertaining what obligations it has undertaken by way of express or implied consent.[85]

Following Grotius, Westlake, and Wolfe, Lauterpacht suggested a hypothesis of both lines of argument. It is not possible either to lean on only rational argument or only on ethical arguments to answer the question of whether International Law has a binding nature.[86] There exists an international community beyond International Law, which provides it with its true basis. This international community interacts with International Law and vice versa:

> Undoubtedly the effectiveness of law depends to a large extent upon the prevalent practice and the general level of morality, but the very fact of the reign of law is, and tends to become increasingly, part of common practice and morality.[87]

International Law is not perfect and depends on the international community to function. Its future development, according to Lauterpacht, would depend on its incorporation into general principles and conceptions as developed by civilised communities without reference to the 'state of nature' existing among States:

> States are not primitive communities and there is a patent contradiction in any attempt to construe relations between States of today as governed by a law of primitive peoples...Only the current personification by the questionable doctrine of the metaphysical State, supported by the questionable doctrine of States as the sole objects of International Law enables writers to assert and

84 Lauterpacht 1933, p. 415.
85 Lauterpacht 1933. p. 420.
86 Lauterpacht 1933, p. 422.
87 Lauterpacht 1933, p. 437.

> justify the possibility of human beings – for States and Governments are made up of human beings – adopting differing standards of order and justice in different spheres of action.[88]

In conclusion, according to Lauterpacht there are four relevant dimensions for understanding International Law's responses to emerging regulatory challenges in International Relations. First, International Law actively interacts with the international community and vice versa. Second, in this system nation-states are the key-actors of International Law. Thirdly, if states perceive of an issue to be in need of international regulation, they can act to reach an agreement, based on a common will of states. This agreement will be legally binding, precisely because it is based on the common will of states, and not on the sovereign will of one individual state. Finally, Lauterpacht holds that part of the effectiveness and legitimacy of International Law depends on the common practices and morality of 'civilised communities.' States will act when developments go against these common practices and morality.

2.3.2 Schwarzenberger: Power Politics

Georg Schwarzenberger belonged to the school of Realism rooted in Conservative philosophy, although he deemed 'so-called' realists too pessimistic, and presented his approach as 'primary empirical'.[89] In the United States this school is represented by Kennan, Niebuhr, and Morgenthau.[90] In Europe this school of thought is often associated with the work of Aron and Bull.[91]

The first edition of Schwarzenberger's Power Politics was published during the Second World War. Its aim was to provide a working theory of International Relations which fitted the facts and main trends of International Relations, past and present, and which would put the proper emphasis on the real driving forces of a turbulent society.[92] The following discussion is based on the second, revised, edition of 1951.

Schwarzenberger argued that law and society are correlative terms.[93] Schwarzenberger distinguished between three functions of law: the law of power, the law of reciprocity and the law of co-ordination. The key to understanding the functions of the international legal system lies in the structure of its social background.[94] The law of power makes co-existence possible, the law of reciprocity introduces fairness and co-operation, while the law of co-ordination integrates the international community.

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88 Lauterpacht 1933, p. 434. In that respect, it is hard to see why human beings when serving governments should adhere to International Law, whereas when working for a multinational corporation would render them outside the concern of International Law.

89 Schwarzenberger 1951, p. 5.

90 See chapter 9.

91 Knutsen 1997, p. 244.

92 Schwarzenberger 1951, p. xvi.

93 Schwarzenberger 1951, p. 28.

94 Schwarzenberger 1951, p. 202.

The primary function of International Law is maintaining the supremacy of force and the hierarchies established on the basis of power and to lend to such a system the respectability and sanctity of law.[95] Beyond the sustaining of the supremacy of force in International Relations and serving practically any of the strategies and tactics of individuals states, International Law helps keep intact the monopoly of the aristocracy of sovereign states in international society:

> International Law fulfils the functions of extreme society law: it gives authority and sanctity of law to power and brute force; without seriously restraining the mighty; it serves as a handy ideology with which to distinguish some of the brutalities which are inherent in any system of power politics.[96]

Schwarzenberger takes care not to rest content with such a bleak description of International Law as a pious fraud. International Law also serves as a law of reciprocity and as a law of co-ordination.

Once Schwarzenberger starts to talk about the second function of International Law, the law of reciprocity, we enter more familiar terrain. He recognises the law of reciprocity in the establishment of international treaties. Treaties are a concrete expression of the principle of reciprocity in spheres in which, on the basis of mutuality, states desire to limit the exercise of their 'unfettered national sovereignty'.[97] If states wish to behave in any rational manner in the realm of political issues, they can meet on the common denominator of reciprocity.

Theoretically, the law of reciprocity seems to assume that all states are more or less the same. Indeed, it has been argued that a certain degree of homogeneity of states is essential for the survival and development of International Law, although by the time Schwarzenberger wrote his book, this seemed to have become of almost no importance:

> International Law was originally only applicable between Christian nations, and was later extended to non-European States on the assumption that the standards of value underlying the Christian law of nations were accepted by the Near and Far Eastern States at least in a modified form, i.e. as the standards common to all civilised nations. But even this element of homogeneity was thrown overboard when the last barrier to heterogeneity was broken down in favour of an International Law that was to apply between all sovereign States.[98]

Schwarzenberger is more worried by something else, namely a development whereby some activities which before the First World War had belonged to the initiative of individuals, had become politicised, and thus rendered over to the domain of power politics:

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95 Schwarzenberger 1951, p. 203.
96 Schwarzenberger 1951, p. 206.
97 Schwarzenberger 1951, p. 208.
98 Schwarzenberger 1951, p. 210.

> Economic, financial and social International Relations, as well as education and culture, are becoming increasingly involved in the turmoil of power politics, where law serves predominantly as an ideology.[99]

Schwarzenberger fostered some hope that, in domains far away from power politics, International Law was beginning to show traces of a community law. He discusses the example of the gradual limitation and abolition of the slave trade as the most impressive contribution so far (1951). In the face of formidable vested interests, public opinion gradually forced a reluctant Parliament into action.[100] Britain then induced the other great powers during the Congress of Vienna in 1815 to agree to the principle of the abolition of the slave trade on the basis of reciprocity. Other hopeful examples in 1951 were the law of international rivers and the General Agreement on Tariffs and Trade (GATT 1947), which introduced the standard of economic good neighbourliness. The contracting parties were under a legal obligation to consult with the other signatories who would be directly affected by any unilateral decision on their part. And, in addition, the agreement endowed the contracting parties acting jointly with far-reaching functions.[101]

What makes International Law binding? In the case of power politics, the answer is relatively simple: the threat to resort to force and/or ultimately war. In the case of the law of reciprocity, the advantages of conformity to International Law are so great that it would not be worthwhile, even for a powerful actor, to break these rules, since the observance could hardly be as irksome as the inconveniences of not having them or of exclusion of their benefits. But there is more to this, the role and interests of non-state actors:

> Within a State, vested interests anxious to preserve stability in the international society, such as export industries, banks or transport and trade establishments can be depended upon to exert their influence to maintain and extend these reciprocal relations, subject to the limitations imposed upon them by any overriding exigencies of power politics.[102]

But is there, as Lauterpacht had argued, any place for ethics in this otherwise very calculated account of reciprocal cooperation in the international community? Schwarzenberger sees two functions for international ethics. First, it can offer optional standards of a higher ethical value than those accepted as legally binding by states. Second, international morality can serve as an agency of growth and development of existing International Law:

> International Law sets minimum standards which are enforced by external sanctions. International morality enables States tentatively to apply higher standards in their relations with each other. If such higher standards are applied over prolonged periods, they tend to crystallise into legal rules.[103]

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99 Schwarzenberger 1951, p. 211.
100 Schwarzenberger 1951, p. 211.
101 Schwarzenberger 1951, p. 213.
102 Schwarzenberger 1951, p. 216.
103 Schwarzenberger 1951, p. 230.

In conclusion, in Schwarzenberger's approach there are again four relevant dimensions for understanding International Law's responses to emerging regulatory challenges in International Relations. First, sovereign-states are the prime actors (the aristocracy) in International Law. Secondly, if states are willing to apply practical high standards in their interactions over prolonged periods, these can become international legal rules. Thirdly, public opinion is being recognised as a force that can change International Laws or morally uphold them, because of vested interests or profound moral outrage. Finally, International Law can be used to limit the exercise of 'unlimited sovereignty' by states through rationally reaching agreements based on the law of reciprocity. Schwarzenberger's greatest worry rose over the fact that economic, financial and social International Relations were becoming infiltrated by the turmoil of power politics, where International Law was serving predominantly as an ideology.

2.3.3 De Visscher: Theory and Reality in Public International Law

According to De Visscher, International Law, entrenched in formal positions, long evaded a direct confrontation with international politics. On the one hand, it tried to do so by favouring the sociological positivism which led to the utopian notion that wanted to eliminate power as a source of law. On the other hand, it tried a flight into a pure science of law, isolated from social realities.[104] His work, Theory and Reality in Public International Law (1957) explores the question whether there is such a thing as the international community which precedes International Law.[105]

Relations between states cannot be separated from the relations between man and power within the State. The dualistic separation of the internal and external orders led International Law initially to take no interest in man, which was regarded as a mere object of International Relations, except insofar as his treatment abroad might influence relations between States.[106] Thus International Law was powerless when human dignity was violated on a large and systematic scale during the two World Wars of the twentieth century.

There can be no international community as long as the political ends of the State overshadow the human ends of power. In order to understand De Visscher's point, one has to look at his definition of politics.

> From a neutral and purely formal point of view, politics may be defined as the pursuit of the common good, understood as that which in a community should ensure the good of each in the good of the collectivity.[107]

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[104] De Visscher 1969, p. 70, with a devastating critique of the theories of Hans Kelsen, p. 67-68.
[105] The edition used here is the 2nd revised translation in English by Corbett published in 1969.
[106] De Visscher 1969, p. 181.
[107] De Vischer 1969, p. 71

The common good is an accepted and not a decreed good, and it will become a living reality only when one ceases to regard the State as the highest form of social organisation.[108]

Bearing this in mind, De Visscher sets out to explain why there is such a thing as the international community. He asserts that every society rests at once upon material and upon moral factors. It is the result of solidarities active enough to call for an organisation of power, and sufficiently conscious of a common good, to engender the idea of law and the sense of obligation.[109] In other words, the legal obligatory nature of International Law depends on something that rests, at least partially, outside its own sphere: morals.

> It is by a return to man, by linking the conception of the State, organization and means, to the person who is its end, that we can find, on the plane of an impersonal but not extra-personal common good, the sole and moral justification of the obligatory character of the common good.[110]

Whereas in the 19th century, the human person became the end of every public establishment, as identified by the various national constitutions of that time, a profound moral and spiritual crisis developed after the First World War, bringing with it 'an unheard of displacement of weight from the individual to the State'.[111] De Visscher worried that when the notion of the common good was no longer harnessed to human ends, deterioration would set in, further enhanced by technological depersonalisation:

> But depersonalisation has as deeper cause: in large measure it results from the transformation of economic activities, from the State's need to coordinate them, and from the phenomena of concentration that call for the State's intervention. It grows with the inertia of opinion which cannot grasp the complexities of the directed or planned economy and is still less capable of discerning 'the immeasurable potentialities for evil, inherent in the state in this age of science and organisation.' It is clear that the chief beneficiary of this technological depersonalisation is today the State in its political action.[112]

De Visscher noted that the transformation of the economic system had fuelled the State's need to coordinate them, and from the phenomena of concentration, the State had called for more intervention. This was helped by the inertia of public opinion, which had been unable to grasp the complexities of modern society. This was, in the eyes of De Visscher, the deeper meaning of the Second World War:

> The key to the problem lies in men's idea of power, in the relations that a regime establishes between the person and the State, in those spiritual and institutional checks and balances which in the true democratic countries resist ex-

[108] De Visscher 1969, p. 71.
[109] De Visscher 1969, p. 90.
[110] De Visscher 1969, p. 101.
[111] De Visscher 1969, p. 124.
[112] De Visscher 1969, p. 125.

> tra-personal conceptions of the common good. There is no foundation for the international order if the internal order does not provide it.[113]

When it comes to positive International Law, human values are the reason behind the legal rule.[114] De Visscher maintains that there is a direct indissoluble connection between respect for human values in the internal order and the effectiveness of International Law.

In conclusion, De Visscher's approach offers five dimensions for understanding International Law's responses to emerging regulatory challenges in International Relations. First, the perception and willingness of states to create international regulatory mechanisms should depend on the protection of human dignity and the promotion of the common good. Second, the capacities of states to act in International Relations are based on an unprecedented[115] concentration of state power and policies. Third, this concentration of state powers led to an exclusion of human persons from the scope of International Law, which in turn led to the atrocities against human dignity during the two World Wars. Fourth, there can be no legitimate and effective international order, if the internal order of states does not provide for one. Finally, human values are the reasonable basis of positive international regulatory mechanisms.

2.3.4 Potential Dimensions for Observation

In the previous section we studies eight 'tipping points' in the historical development of International Law. In this section, three interpretations of those historic tipping points were introduced. All three authors have identified relevant dimensions for understanding International Law's responses to emerging regulatory challenges in International Relations.

[113] De Visscher 1969, p. 128.
[114] De Visscher 1969, p. 180.
[115] De Visscher uses 'unheard'.

Relevant dimensions of the Interaction between International Law and International Relations

Lauterpacht	Schwarzenberger	De Visscher
International Law actively interacts with the international community and vice-versa	Sovereign states are the prime actors in International law	The perception and willingness of states to create international regulatory mechanisms should depend on the protection of human dignity and the promotion of the common good.
Nation-states are the key-actors of international law	If states are willing to apply practical high standards in their interactions over prolonged periods, these can become international rules.	The capacities of states to act in International Relations are based on an unheard concentration of state power and policies
If states perceive of an issue to be in need of international regulation they can act to reach an agreement based on the common will of states, which will be binding	Public opinion is being recognised as a force that can change International Laws or morally uphold them, because of vested interests or profound moral outrage,	This concentration of state power and policies led to an exclusion of human persons from the scope of international law and atrocities against human dignity.
Part of the effectiveness and legitimacy of International Law depends on the common practices and morality of civilised communities.	International law can be used to limit the exercise of unlimited sovereignty by states through rationally reaching agreements based on the law of reciprocity.	There can be no legitimate and effective legal order, if the internal order of states does not provide for one.
		Human values are the reasonable basis of positive international regulatory mechanisms.

The question now before us, is whether we can distil from these relevant dimensions and from analysing the historical 'tipping points' in section 2.2 those key dimensions that could help us to observe the developments (movement, change and continuity) in the interaction between International Law and alternative regulatory mechanisms in International Relations today.

2.4 Analysis

During the 19th century, International Law became, first and foremost, an affair of sovereign nation states. Other actors did start to participate and contribute to International Law, but were not recognised as having the same status as states. The concept of sovereignty was used to prevent other possible participants from gaining a full status in the international political arena. The concept of sovereignty depends heavily on the idea of the impermeability of legal orders.

The idea of the impermeability of legal orders was based on the Westphalian principle 'cuius regio, eius religio'. This principle meant that the prince (and later the government) was internally free to organise his government and laws, and only externally bound by international treaties.[116] John Austin (1790-1859) defined law as the general commands of a sovereign, supported by a threat of sanctions.[117] As a sovereign could only rule his or her own territory, it seemed obvious that the legal order, could not be larger than the sovereign's territory. Whatever happened within that sovereign legal order, could not be influenced from outside. A judge, or a sovereign, could not exercise any jurisdiction beyond their own territories. The national legal order was considered to be impermeable.[118] Yet, in practice, the borders between nations were more permeable and their laws more intertwined then official theories were willing to admit.

De Visscher argued that the state is not one 'person' but consists of various actors and organisations. For a long time, based on the idea of the impermeability of legal orders, these non-state actors were hidden from the view of International Law and international relation. This situation is changing, as the following discussion of State-sovereignty by Wendt illustrates:

> [the] "physiological" structure [of sovereignty] relates the various individuals and bureaucracies which make up a state actor to each other, assigning functional, territorial, or issue-area sovereignties within a framework of rules and procedures for settling jurisdictional conflicts and ensuring harmonious operation...In this light we can see why it is difficult to find sovereignty in the modern state, since structures do not have a single location. The sovereignty of a state actor only becomes apparent when we look at the structure through which its parts become a corporate whole.[119]

The sovereignty of the state thus has many dimensions: internal, external, and is fragmented along the organisations that make up a state. Therefore, Slaughter[120] has argued that the 'fictitious' concept of state sovereignty itself should be disaggregated in order to reflect the reality of modern governance:

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[116] Malanczuk has even argued that the study of sovereignty began as an attempt to analyse the internal structure. of the state (Malanczuk 1997, p. 17).
[117] Quoted in: Malanczuk 1997, p. 17.
[118] Today, this idea is changing, see: the continuation of this discussion in chapter 3, section 4.
[119] Wendt 2001, p. 207-208. Sovereignty seems no longer bound to one person or institution.
[120] Slaughter 2004, p. 32-35.

> ...suppose individual national government institutions could become bearers of rights and responsibilities of sovereignty in the global arena. Suppose sovereignty itself could be disaggregated, that it attached to specific government institutions such as courts, regulatory agencies, and legislators or legislative committees. But as exercised by these institutions, the core characteristic of sovereignty would shift from autonomy from outside interference to the capacity to participate in transgovernmental networks of all types. This concept of sovereignty as participation, or status, means that disaggregated sovereignty would empower government institutions around the world to engage with eachother in networks that strengthen them and improve their ability to perform their designated government tasks individually and collectively.[121]

This brings into question the original concepts of sovereignty that have been based on Bodin's philosophy, and that Slaughter has sought to amend. Sovereignty seems not to be a good, that can be possessed; but a right, or, as Slaughter identifies, a 'status to participate'.[122] The concept of sovereignty functions as an 'entry ticket' to International Relations. But is this 'status' necessarily restricted to states, and their institutions? Not so, according to Maritain, who voiced a strong critique of all 'Bodin'-like concepts of state sovereignty:

> Here we are confronted with the basic wrong of the concept of Sovereignty, and the original error of the theorists of Sovereignty. They [the advocates of Bodin-like concepts, RS] knew that the right to self-government is naturally possessed by the people. But for the consideration of this right they substituted that of total power of the commonwealth. They knew that the "prince" receives from the people the authority with which he is vested. But they had overlooked and forgotten the concept of vicariousness stressed by medieval authors. And they replaced it with the concept of physical transformation and donation.[123]

According to Maritain, Bodin and his followers discussed sovereignty in terms of goods or material power that can be held in ownership or trusteeship: the state 'owns' sovereignty; the prince is 'entrusted' with sovereignty. However, Maritain thought that the philosophers should have been discussing sovereignty in terms of rights possessed by essence or participation:[124]

> ...a right can be possessed by the one as belonging to his nature, and by the other as participated in by him. God is possessed by essence of the right to command; the people are possessed of this right both by participation in the divine right; and by essence insofar as it is a human right. The 'vicars' of the people or deputies of the people are possessed (really possessed) of this right only by participation in the people's right.[125]

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[121] Slaughter 2004, p. 34.
[122] Or, a 'property of structure' in a Weberian sense.
[123] Maritain 1951, p. 35.
[124] Compare the point made by Slaughter above.
[125] Maritain 1951, p. 35.

Notably, a few other actors have been recognised as sovereign actors in International Relations, most notably the Holy See. However, when states 'own' sovereignty in International Relations, then other actors, international organisations, multinationals, non-governmental organisations, persons, cannot participate on an equal footing in international political games of sovereign actors. But when it is recognised that the sovereignty of the state depends on its participation in the sovereignty of these other actors, 'the people', a different perspective on International Relations and International Law becomes possible.

Following Maritain's argument, we can see how non-state entities (various ways in which 'the people' have organised themselves) are the original bearers of state sovereignty, and should therefore be able to be entrusted with a status to participate as sovereign actors in International Relations. That is not to say that the state is no longer sovereign, or that the state no longer plays a role. The state may not be the only actor in the international system concerned with International Law, but it is still an important actor.[126] In conclusion, a state-focused concept of sovereignty does not fully incorporate the realities of state organisation today, or in the past.[127]

As a result, we can draw the following three conclusions with regard to position, capacity and accessibility of International Relations. Firstly, it seems that sovereign states are important actors in International Relations and, according to the authors, also in International Law. They are, as the historical development has revealed, not the only actors. There are other actors as well. The first dimension should therefore focus on which actors are holding the key positions in the (alternative) regulatory mechanisms that are being created today.

Secondly, De Visscher wrote that the capacity of states to act in International Relations is based upon an 'unheard' concentration of state power and policies. Schwarzenberger speaks about the development whereby states can create international regulation if they are willing to apply practical high standards in their interactions over prolonged periods. Lauterpacht noticed that if states perceive of an issue to be in need of international regulation they can act to reach an agreement. Thus, apparently, one has to make a distinction between formal position and *de facto* willingness and capacity of key actors to act.

Thirdly, there is the issue of interaction. Lauterpacht wrote that International Law actively interacts with the international community and vice-versa. De Visscher noted that the concentration of state power and policies had led to an exclusion of human persons from the scope of the international community. However, sovereignty can also be understood as a status to participate in International Relations, which is not necessarily restricted to nation-states. Therefore, the third element for observing the more recent regulatory developments in International

[126] Slaughter 2004, p. 18.

[127] See for a similar observation section 3.3, pp. 44-46 of a report by the Dutch Scientific Council for Government Policy on the future of the national constitutional state (WRR 2002).

Relations should focus on the accessibility of ('the entry-ticket to') International Relations, specifically with regard to non-state actors.

2.3.4.2 Legitimacy and Effectiveness

In conclusion, the fourth key dimension for observation of new developments in the regulation of International Relations should focus on the legitimacy of these alternative mechanisms. The fifth dimension should focus on the question of whether these alternative mechanisms work - in other words: whether these alternative mechanisms are effective.

2.5 Conclusion

This chapter specifically looked at eight stages in the historical development of International Law, and reflected on the some of the important concepts in International Law theory. It seems that throughout the development of International Law, specific historical circumstances influenced the direction of that development. The primitive early medieval understanding of International Law, geared towards kings, gave way to a more sophisticated understanding that coincided with the rise of large kingdoms, and the organisation of trade relations between kingdoms and cities and new continents. After the wars of religion, a whole new organisational concept of society emerged, the nation-state, which immediately was in need of a system for regulating the interactions between nation-states: the Treaty of Westphalia. In this system, the nation state emerged as the sole subject of International Law.[128]

Growing trade and growing fears for disrupting the power balance in Europe, led to a further sophistication of International Law, while the mechanisation of warfare led to a widening of the principles and participants. The new participants became recognised as objects of International Law, while the sovereign nation state remained the subject of the law. The end of the Second World War marks another important watershed in International Law when, among other things, the United Nations organisation was created, and the idea of universal human rights was formally introduced in International Law. The result of these developments was that International Law not only regulated the International Relations between states, but more and more developed its own body of material rules which applied to state subjects and non-state objects of International Law alike.

The scope of International Law broadened considerably to include almost everything from war and peace questions, to international trade, and poverty reduction. With regard to its participants, International Law accommodated for nation-states, international organisations, private initiatives, groups and individuals. As for its practices, they have become more and more complex with regard to the

[128] See for a critique of the understanding of International Law containing only 'subjects' and 'objects': Higgins 1994, pp. 49-50. More on this debate can be found in section 4.2.1, 'sovereignty as position'.

creation of law, implementation of law and addressing the participants through law.

In conclusion, this chapter tried to answer the question of which dimensions of International Relations have been important in the creation of regulatory responses of International Law to changing demands in the past. Analysing the growing complexity of the interaction between International Law and International Relations in the past, we have been able to distil five key dimensions for observing change and movement: position; capacity; accessibility; legitimacy and effectiveness. These dimensions could serve as the graded lenses to observe continuity and change in the regulation of International Relations today. The next chapter will provide an introduction to the current complexities of the interaction between International Law and International Relations in the context of today's socio-economic globalisation processes. At the end of that chapter, we will evaluate the 'key dimensions for observation' found in this chapter. Can these key dimensions provide the building blocks for a framework for observing the interactions between new arrangements for regulating international relations and the traditional body of International Law?

3. Dimensions of Change and Continuity in the Context of Economic Globalisation.

3.1 Introduction

States today confront new geographies of power.[1] One of these new geographies is socio-economic globalisation. Socio-economic globalisation[2] consists of the structural changes in the global political economy, in which two particular features stand out: the liberalisation of national economies and the rapid innovations in information technologies.[3] This process has brought with it strong pressures for the deregulation of a broad range of markets, economic sectors, and national borders; and for the privatisation of public sector firms and operations. Sassen has argued that the new conditions of the global political economy carry consequences for the role and content of International Law: its scope, exclusivity, normative power, and its organisational architecture.[4] Thus, one entry into the question of the relationship between new arrangements for regulating International Economic Relations and the traditional body of International Law is through the study of the particular features of the global political economy.[5]

This particular chapter will begin by looking at the changing regulatory demands in International Economic Relations in the context of socio-economic globalisation. It will then set out to analyse how these demands might have affected the five dimensions for observing change and continuity in the interaction between International Law and International Economic Relations.

The first part of this chapter, containing sections 2 and 3, will discuss and analyse the changing demands of economic globalisation to the regulation of International Economic Relations. The second part of this chapter, section 4, will discuss and analyse some of the initial studies that have been made into the question of how these changing demands in the regulation of International Economic Relations may have affected the traditional body of International Law. It will turn out that the transformative processes occurring in the global political economy are far more differentiated processes than notions of an overall decline in the significance of the regulatory capacities of states or International Law.[6] The conclusion of the second part of this chapter will be that we need more detailed studies of recent developments in the regulation of International Economic Relations.

Therefore, the final part of this chapter, beginning at section 5, will return to the five dimensions identified in the previous chapter that provide the lenses for observation of change and continuity in the interaction between International Law

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1 Castells 1997 (2004), Reinicke 1998, Held 1999, Sassen 2000, 2007.
2 Socio-economic globalisation and economic globalisation are both being used to acknowledge the same developments occurring in today's political economy.
3 O'Brien 2000, Todaro 2003, Mosley, 2007.
4 Sassen 2000, p. 109.
5 Compare: Sassen 2006, p. 74.
6 Compare: Sassen 2000, p. 109.

and International Economic Relations. How are these particular dimensions affected by economic globalisation? The answer to that question is important, as the five dimensions are intended to become the central building blocks of the empirical framework for observation that will be created in chapter 4 to conduct the exploratory case-studies in chapters 5, 6, and 7 into the interactions between new arrangements regulating International Economic Relations and the traditional body of International Law.

3.2 Globalisation as the Rise of Global Free Markets

This section will explore the changing demands in the regulation of International Economic Relations caused by the liberalisation of national economies. This process has been called the rise of the global free market. We will discuss three studies. The first, historical, study by Schwartz analyses the historical processes that gave rise to the idea that the State is losing its capacity to regulate the global political economy. The second study, by Friedman, goes beyond this point and argues that states have not only have lost their capacity to regulate the global political economy, but that the global political economy is now dictating state behaviour and its internal regulations. By contrast, the third study by Legrain offers a counterpoint arguing that the state has not become as powerless as argued by Schwartz, Friedman, and others.

Example: Numerical growth of actors in the Global Economy

In 1993, it was estimated that 37,000 transnational corporations were active in the global economy, operating through 170,000 foreign affiliates. Ten years later, the estimates had risen to 64,000 transnational corporations, operating through 870,000 foreign affiliates.

Sources: (UNCTAD 1993, 2003).

3.2.1 Schwartz: The State is losing its Capacity to Regulate the Global Free Market

In the empirical studies of 'States versus Markets', Schwartz describes how markets created distinct spatial patterns in national production and how states attempted to influence that distribution of production first through national, and subsequently through international regulation. Schwartz argues that there is a symbiosis between states and economic markets. Globalisation, understood by Schwartz as pervasive global price pressures on all market actors, should not be seen as something new, and neither are the persuasive and often successful efforts by states to contain those price pressures. Modern states and modern markets cannot exist without each other: states selectively created and enforced the property rights that maintain markets, property rights sustain the accumulation of capital and growth, and this has enabled a faster redistribution of economic ac-

tivities over a global space.[7] Therefore, this study might help to make an assessment with regard to how the free market has influenced the state's capacity to participate in and regulate international economic relations.

From 1500 to the First World War, states consciously created markets for the export of goods. Within that period, roughly from 1500 to 1800, states created markets for their agricultural goods and slowly extended those markets into all agricultural production. In the 19th century the global market was extended to industrial goods and this, in the end, extended to agriculture with disastrous results in the 1930s. The domestic conclusion that states drew from the Great Depression, was that to allow the international market untrammelled ability to influence domestic production and employment was a recipe for disaster.[8] The trauma of the Great Depression led to very strict regulatory mechanisms as laid out in the Bretton Woods system, which, in turn, gave rise to the GATT /WTO system, and the international monetary system under the IMF.

These global trade rules subordinated trade flows to full employment and social protection. However, the uses of those rules created new material interests and goals which undermined both these goals. Politically, states have now come full circle trying to re-create markets for goods and services in which they were competitive, but whose markets had been suppressed under the Bretton Woods system. At the same time, multinationals have dispersed their operations into new transnational production networks, pressing the states for stable political regulation of flows between the various countries in which production is taking place. As a result new rules regulating trade at the global and regional level were introduced which could no longer guarantee full employment and removed large parts of social protection.[9] As a consequence, the current phase of accelerating globalisation is the planned result by market actors (multinationals) and states that stood to benefit from the destruction or reconfiguration of various forms of social protection created in the 'golden era' of the Keynesian welfare state.[10] Two shifts seem to be occurring at the same time.

Firstly, with regard to international monetary flows, Schwartz concludes that the policies pursued in Western societies in the 1980s, characterised by the removal of capital controls and the privatisation of publicly owned public sector services, created a shift that essentially ended states' capacities to orchestrate economic growth. With the exception of the United States, states can no longer regulate monetary policies and control direct investments to secure economic growth.[11] Secondly, with regard to international trade, Schwartz concludes that, after the unravelling of the controlled capital system of Bretton Woods, multinationals began to shift labour-intensive production in stages to low-wage zones. This transnationalisation of production created continental or hemispheric production

7 Schwartz 2000, p. 1.
8 Schwartz 2000, p. 192.
9 Schwartz 2000, p. 279-280.
10 Scwartz 2000, p. 317-318.
11 Schwartz 2000, p. 217.

complexes, which are not all based within one country, and not subject to one set of (national) rules. One of the direct effects of the dispersal of production was the rapid growth of intrafirm transfers (by 1996 already 33% of the total world exports). These intrafirm transfers are not subject to international state-based regulatory mechanisms.[12] On the other hand, and despite the flexible production across the world, multinationals remained firmly rooted in the political and institutional structures of their home economies.

In conclusion, Schwartz thinks that the United States would have been the only country capable of balancing this system if it had not been undermined by the international and macro-economic imbalances created by the financial crises of the 1990s. As a consequence, Schwartz argues that markets rule, and that the driving force behind international regulation is the conflict between states worried about their global market shares, reacting to shifts in their relative ability to generate export systems and attract capital investments. This self-interest to benefit from the global free market, and therefore the political unwillingness to suppress the potential benefits of this global market explain, in Schwartz's analysis, the steady erosion of the state's capacity to regulate international economic relations.[13]

3.2.2 Friedman: The Global Free Market as a Golden Straitjacket for the State

The challenge of the free market to the state is hardly a challenge at all according to Thomas Friedman in the "Lexus and the Olive tree"[14]. Friedman agrees, like Schwartz above, that globalisation is not something new. Rather, this particular phase of globalisation is new, having started when the Berlin Wall fell in 1989.[15] The Cold War state-system was followed by a new international system which he labels "globalisation". The globalisation system has one overarching feature: integration. Led by the forces of free-market capitalism, the world is becoming an increasingly interwoven place. And, regardless of whether you are a company or a country, shifts, threats, and opportunities derive from those to whom you are connected.[16]

Within this situation the state is no longer in the position to see the global free market as a challenge that it can take on. States will have to wear a straightjacket in order to survive. States can either join the global free market by putting on the "Golden Strait-Jacket", or risk a total failure of the economic welfare of their citizens. This golden straitjacket comes with its own rules and logic:

> To fit into the Golden Straitjacket a country must either adopt, or be seen as moving forward, the following golden rules: making the private sector the primary engine of its economic growth, maintaining a low rate of inflation and

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12 Which, in case of the United States, means that in the 1980s, 80% of all US imports were intrafirm, multinational controlled imports, staying outside the state-regulatory mechanisms. Schwartz 2000, p. 237.

13 Cf. Schwartz 2000, p. 318.

14 Friedman 2000.

15 Friedman 2000, p. xvi.

16 Friedman 2000, p. 8.

> price stability, shrinking the size of its state bureaucracy, maintaining as close to a balanced budget as possible, if not a surplus, eliminating and lowering tariffs on imported goods, removing restrictions on foreign investment, getting rid of quotas and domestic monopolies, increasing exports, privatizing state-owned industries and utilities, deregulating capital markets, making its currency convertible, opening its industries, stock and bond markets to direct foreign ownership and investment, deregulating its economy to promote as much domestic competition as possible, eliminating government corruption, subsidies and kickbacks as much as possible, opening its banking and telecommunication systems to private ownership and competition and allowing citizens to choose from an array of competing pension options and foreign-run pension and mutual funds. When you stitch all of these pieces together you have to the Golden Strait-Jacket.[17]

On the political front, the Golden Strait-Jacket narrows the political choices of those in power to tight parameters. This leads more and more to the politics of nuances within these parameters, rather than extremes between opposition and ruling political parties.[18]

Example: transformation of political commitments into legal obligations

Without any supranational bureaucracy, the commitment made by the states par-ticipating in the North-American Free Trade Agreement (NAFTA) not only to open their markets, but equally importantly, to enforce their domestic laws: "necessarily forces a wide range of national bureaucracies to work together in the day to day running of the system. It not only brings together national trade authorities but labour, transportation and agriculture departments, securities, banking and other regulators of financial services, anti-trust authorities and more."

Source: Slaughter (Swann) 2004

What are the consequences of the Golden Strait-Jacket with regard to the state's capacity to regulate international economic relations? First of all, Friedman sees that states are more and more synchronising their policies. Within this effort of synchronisation, the exchange-rate policies of the United States determined many states' policies, including their fiscal policies. An Indian minister of finance remarks on the practical implications of the restriction of states' fiscal capacities:

> In a world, in which capital is internationally mobile, you cannot adopt rates of taxation that are far from the rates that prevail in other countries and when labour is mobile you also can't be out of line with others' wages.[19]

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17 Friedman 2000, p. 105.
18 Friedman 2000, p. 106.
19 Friedman 2000, p. 108.

The Golden Strait-Jacket also functions as a 'partial-protection' to a new international power that is threatening the states and nations: the Electronic Herd.[20]

According to Friedman, the Electronic Herd consists of all the stock, bond and currency traders sitting behind computer screens all over the globe, moving their money around from mutual funds to pension funds to emerging market funds, or trading on the Internet from their basements. And it also consists of big multinational corporations who spread their factories around the world, constantly shifting them to the most efficient low cost producers:

> This herd has grown exceptionally thanks to the democratizations of finance, technology and information – so much so that today it is beginning to replace governments as the primary source of capital for both companies and countries to grow.[21]

Governments' policies will aim not to offend the herd, because if it gets into a panic-stricken stampede, it will leave a country's economy in ruins. Actually, it seems that there is no government, let alone a global government, that can control the herd that comes with the global strait-jacket. It leaves the student of state-based International Law with a big problem though. If individual states and their international institutions are not in control of the herd, then how can one protect human beings and their communities?

Friedman argues that, instead of the state system, the new era of globalisation entails a world of networks, in which individuals, communities, consumers, activist groups and governments all have the powers to shape human value chains.[22] A big challenge when studying International Economic Relations today is that what is new – the pressures, incentives and complexities of the globalisation system – is interacting with what is old – which is the nation-state based system of International Law.[23]

In conclusion, Friedman's arguments seem to suggest that it is not that the state is unwilling as much as unable to regulate the global free market. Its only means of survival seem to be adapting to the global free market, and synchronising its policies with the rest of the world in order to accommodate the economic powers of the electronic herd. The original powers of states that enabled the protection of human value chains, individuals, and communities, have now been dispersed among many non-state actors. Protecting individuals and their communities calls for new networking governance strategies, the outcome and success of which are quite uncertain.

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20 Friedman 2000, p. 109.
21 Friedman 2000, p. 109.
22 Friedman 2000, p. 206. Compare also to the trilogy by M. Castells ,The Information Age: Economy, Society and Culture (beginning with the 2· revised edition of June 2000).
23 Compare Friedman 2000, p. 271. See also Cassese 2005, p. 21.

3.2.3 Legrain: A Reappraisal of the Role of the State

In "Open World:/The Truth about Globalisation", Legrain argues that, despite the rhetoric of academics and politicians, there is no empirical evidence to back up the claim that the state is losing its control to deal with gaps in the economic realm of International Relations[24] According to Legrain Globalisation is primarily a political choice.

Whereas governments, by creating nation-states divided people geographically, globalisation is bringing people together again. Secondly, globalisation benefits both the rich and poor countries. Thirdly, globalisation is much better than what came before.[25]

With regard to the position of the state, Legrain is not convinced that the rise of the global free market has made the state powerless, or has constrained state policies to a large extent. His argument is that multinationals, people, and money are more or less tied to the political and institutional structures of their home economies, so governments can still influence them. Legrain gives four examples, with regard to trade barriers, capital markets, the labour market and the role of government, to make his point.

Firstly, many trade barriers remain in agriculture and services, making up two-thirds of the global economy. Furthermore, new barriers keep cropping up, even in cyberspace, like the EU data-privacy directive. And even if all barriers were to be removed, different accounting rules, legal systems, languages and cultures would segment the markets.[26]

Secondly, capital markets are not genuinely global either. For instance, foreign ownership of US stock in 2001 amounted to $1.5 trillion in shares out of a total stock market value of $13.6 trillion.[27]

Thirdly, due to all kind of migration laws and restrictions, the labour market, on a global scale, is not free either. The role of government is not diminishing. The average taxes, affecting also the labour market, in OECD countries rose from 32.1% in 1980 to 37.3% in 1999.[28]

Finally, multinationals are physically rooted in places; they need an infrastructure of roads, telecommunication services, skills-teaching, and a supplier network.[29] Without them multinationals cannot function, and organising them falls mainly within the domain of the nation-state.

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[24] International financial markets do make life difficult for the governance of many developing countries, but rich countries have enough scope to borrow money if they want to. Legrain 2002, p. 164.
[25] Legrain 2002, p. 322.
[26] Legrain 2002, p. 156-157.
[27] Legrain 2002, p. 157.
[28] Legrain 2002, p. 161.
[29] Legrain 2002, p. 159, Compare: Sassen 1999.

So where does the rhetoric that the state is loosing control over the global free market come from? Legrain thinks that part of it rises from a genuine misunderstanding of globalisation processes, and part of it seems to stem from political opportunism:

> The belief that globalisation limits governments' options is so persuasive that many politicians have doubtless come to believe it. But there is a large element of deception. When politicians tell you that 'in a global economy' this or that policy has to change, take it with a bowl of salt. Like the EU or the WTO, globalisation is a helpful scapegoat for changes that are politically controversial. 'Whatever you do, blame globalisation' is the maxim of modern government.[30]

Contrary to the expectations of Schwartz and Friedman, Legrain expects that calls for state policies to respond to gaps in international economic relations may be growing. The reason being that when societies are exposed to 'the vagaries of global economic forces, they may be keener on social spending to insure against increased risk'.[31] Legrain strongly believes that the traditional model of governance has many advantages over all other forms of global governance:

> The lines of responsibility are clear: governments set the rules of the game, companies the aim to make profits subject to those constraints. This is not only democratic, it is also fair: laws are transparent, apply equally to all companies, and are impartially enforced by the courts. And it is flexible: laws can vary according to local conditions and preferences. The best way to help workers and the environment is generally through national laws drafted on the basis of democratic participation and consultation. Governments are more than capable, either individually or collectively, of achieving social aims through legislation.[32]

Whereas Schwartz and Friedman argued that the acceptance of the global free market was inevitable for states to operate and survive in the global political economy sphere of International Economic Relations, Legrain argues that it is not, and that to argue otherwise is an intentional political act:

> Once you take the crucial step and accept that we can still shape our destiny, globalisation's opportunities are all the more apparent, its threats suddenly seem less menacing. The future of our open world is in our hands. We are free to make the best of it – or waste it.[33]

In conclusion, in Legrain's 'Open World', the state capacity to regulate international political and economic relations depends on the political will of politicians, and less on the (perceived) limitations of the global free market. The limitations on state capacities to regulate the global free market are therefore based either on a misunderstanding of globalisation processes or on political opportunism.

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30 Legrain 2002, p. 172.
31 Legrain 2002, p. 171.
32 Legrain 2002, p. 209-210.
33 Legrain 2002, p. 334.

3.2.4 Analysis

How might the emerging global free-market change the position and capacities of the state to regulate international political, economic and cultural relations? The review of three important works that touch upon that question reveals a range of opinions. On the hand there is the idea that while states may have actively striven for the spread of the global free market, they are no longer in control of the consequences (Schwartz) or they are controlled by the consequences (Friedman). On the other hand, there is the opinion, that the global free market has not really challenged the state's position and capacities and that the perception that something has changed is either based on a misunderstanding of globalisation processes or on political opportunism.

If Schwartz and Friedman are right, we should find states that are very docile to the demands of the global markets and (at least politically) no longer capable of providing adequate regulation of international political, economic and cultural relations. Interestingly, all three authors seem to agree that in this debate we should expect a hefty dose of political opportunism in states' responses to requests for the regulation of international, political, economic, and cultural relations.
In fact, what we are seeing according to Sassen is the repositioning of the state in a broader field of power and a reconfiguration of the work of states in the regulation of the political economy:

> Whereas the state has historically had the capacity to encase its territory through administrative and legal instruments it also has the capacity to change that encasement – for instance, deregulate its borders and open up to foreign firms and investment.[34]

In another study, Sassen made the point that when studying these developments in International Economic Relations it is important to realise that the global and the national are not mutually exclusive:

> ...we are [not] seeing the end of states, but, rather, that states are not the only or the most strategic agents in the new configuration. ...states, including dominant states, have undergone profound transformations as they become the institutional home for the operations that are central to globalization. [The question is] whether such change will weaken or alter the organizational architecture for the implementation of International Law insofar as the latter depends on the institutional apparatus of national states.[35]

However, the global free market is not the only cause of shifts in the regulation of International Relations. Much of the rapid expanse of the global free market depended on the availability and capacities of new information technologies.

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34 Sassen 2006, p. 416.
35 Sassen 2000, p. 111.

3.3 Globalisation as an Information and Communications Revolution

This section will explore the changing demands in the regulation of International Relations caused by the Information and Communications revolution. A discussion of studies by Sassen en Tehranian[36] illustrates how these technologies have enhanced the capacities of non-state actors to influence both the internal capacities of the state with regard to the protection of its own citizens, and the external rules of International Relations.

3.3.1 Sassen: Sovereignty and the Digital Challenge to the State

Sassen has become well known for her work investigating the new geography of power shaped by economic globalisation.[37] In her work she recognises three crucial elements of this new geography. Firstly, there is the territoriality of globalisation processes: globalisation can only function through specific institutions and processes which are based somewhere. The second element consists of the emerging new legal frameworks enabling and regulating cross-boundary economic transactions. The third element, and the one that is of most interest in this section on the impact of the ICT-revolution on the state's capacities, is the increasing number of economic transactions that are taking place in the digital space.[38] In this section the implications of the digitalisation of trade with regard to the position and capacities of the state will be explored.

The digitalisation of an increasing number of economic transactions are a major challenge, not only to the public-sector, but also to the private sector. Governance problems are not occurring as a result of the extension of the economy beyond national borders, but are the result of the digitalisation of financial transactions. The digitalisation has not only increased the speed of the transactions, but also the sheer size of the transactions. Sassen points to the international money-market which, in the mid 1990s, traded a billion dollars a day, an amount that no central bank could ever influence through exchange-rate policies.[39]

General characteristic of the Internet are that it power has become decentralised, open, has unlimited possibilities for expansion, no hierarchy, no centre, and no specific conditions that could benefit an authoritarian or monopolistic "coup de état". Yet, at the same time, the Internet enables new sorts of power, or alternative power, through processes called 'cybernatic' segmentation. This process started through the commercialisation of Internet access. The commercialisation of Internet access has led to calls and lobbying for more deregulation. The second element of the segmentation process comes from organisations that commercially sort, select and filter information (think of Google here).[40]

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36 Sassen 1999, see also Sassen 2006 and Tehranian 1999.
37 Most recently with her study on territory, authority and rights: Sassen 2006.
38 Sassen 1999, p. 18. See also the trilogy of M. Castells.
39 Sassen 1999, p. 32.
40 Sassen 1999, p. 153.

These characteristics have the following empirical effects. First, the increasing digitalisation and globalisation of the economic sectors has given an extra impulse to the concentration of resources, infrastructure and central functions. Secondly, the growing economic interests of the digital space promoted the creation of global alliances and high concentrations of capital and corporate power. Thirdly, these factors have, in turn, led to new forms of segmentation in digital space.[41] These resulted in recurring clashes between corporate governance and civil society.[42] This is becoming more problematic as national governments seem less and less capable of responding to these clashes. The ongoing integration of national communication networks into global networks, has taken regulatory power and control away from the nation-state. Furthermore, state governments are put under pressure by companies which claim that they do not want to be left behind in the new digital rat-race, and ask for more deregulatory measures and privatisation.[43]

The spread of the Internet has, for example, enabled civil society organisations to engage with the politics of the global age. For instance, there is some sort of democratic forum where Friends of the Earth can debate with the US Christian Coalition, or Shell. Yet there are also, there are more violent criminal applications (black web), that can undermine the politics, economy and culture of a state.[44]

In conclusion, the digitalisation of economic transactions, the commercialisation of internet access, the growing pressures from multinationals to privatise and deregulate, and the more or less benign applications of the world wide web, serve as powerful reminders that the ICT revolution is not a neutral revolution, but is influencing traditional structures of national and international governance. This digitalisation is specifically challenging the state's position and capacities in regulating international political, economic, and cultural relations. The world wide web is not a neutral instrument, but an embedded one. Therefore it can reflect many things, from a benign application for the common good, to evil applications undermining state authorities and upsetting (global) societies.

3.3.2 Tehranian: Global Communication and World Politics

The study Global Communication and World Politics,[45] specifically focussed on, what Tehranian sees as the latest phase of development of International Relations, 'informatic imperialism'. Although using different methods of analysing current developments, and more ideologically-coloured, Tehranian's work seems to confirm some of the points made by Sassen.

According to Tehranian, Informatic Imperialism is imperialism supported by developed countries, characterised by control of knowledge industries and informa-

41 Sassen 1999, p. 161.
42 Sassen 1999, p. 162.
43 Sassen 1999, p. 162.
44 Sassen 1999, p. 165.
45 Tehranian 1999.

tion channels, including science, technology, patents, copyright, data, ideas, and images.[46] Informatic Imperialism, according to Tehranian is the next stage of development in International Relations, after "ideological purism" partially and gradually gave way to the world wide penetration of global capitalism. Like Sassen, he implies that the global information and communications revolution is not merely a technical phenomenon:

> Although each technology brings forth its own bias to the social scene by extending this or that human power...it is the social mediations, constructions, and applications of technologies that ultimately determine their social effects.[47]

In this process there is a growing divide between rich and poor states. Poor states cannot afford cheap new technologies because patent rights are being held by multinationals based in rich countries. Furthermore, these new technologies are capital intensive, not labour intensive. Even if poor states invested in new technologies, this would not necessarily lead to an improvement of their economic fate. Thus, while the rich are integrating through the Internet, the poorer parts of the world are more and more marginalised.[48]

How might this global communications revolution alter the position and capacity of the state in International Relations? According to Tehranian, the global communications revolution is challenging the position and capacity of states, because it is undermining traditional state boundaries and thereby their sovereignty. On the one hand, the international mass media are violating national borders by broadcasting foreign news, entertainment, educational and advertising programs. On the other hand, the micromedia of global communications are narrowcasting their messages through audio and videocassette records, fax machines, and computer disks and networks, including the Internet. This process has also empowered hitherto forgotten groups and voices in the international community:

> Global communication...has created new moral spaces for exploring new communities of affinity rather than vicinity. It is thus challenging the traditional, top-down economic, political, and cultural systems.[49]

The global communications revolution is not only challenging the internal capacities of the state, it is also profoundly changing the rules of International Relations. These changes have at least two dimensions. On the one hand, the changes facilitate transfers of science, technology, information, and ideas from the centres of power to the peripheries. While, on the other hand, the changes are imposing a new cultural hegemony through the "soft" power[50] of global news, entertainment and advertising:

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46 Tehranian 1999, p. 5.
47 Tehranian 1999, p. 81.
48 See also the arguments offered by Todaro and Smith 2003.
49 Tehranian 1999, p. 60.
50 In Tehranian's work, "hard" power refers to material forces such as military and economic leverage, and "soft power" suggests forces such as ideological, cultural and moral appeals. Tehranian 1999, p. 61.

> Globalizing the local and localizing the global are the twin forces blurring traditional boundaries.[51]

Tehranian argues that the new information and communication technologies are contributing to changes in economic infrastructures, competitiveness, and trade relations, as well as internal and external policies of states. It also affects issues of national security, the conduct of war, the development of weapons and intelligence collection.[52]

In his study, Tehranian makes the point several times that one of the most important consequences of increasing global communication has been a global rise of cultural and political resistance against globalist hegemonies, mobilising the peripheries of a globalising world against the new centres of power.[53]

In conclusion, like Sassen, the work of Tehranian suggests that the impact of the new information and communications technologies on the position and regulatory capacities of the state in International Relations is ambiguous to say the least. On the one hand it seems to lessen the state's capacities because traditional boundaries and notions of sovereignty are undermined. On the other hand it strengthens the rich states' capacities versus the poor states' capacities in International Relations, because of the availability and price-tag of the new technologies.

3.3.3 Analysis

According to Sassen and Tehranian, the new information and communication technologies have had a significant impact on the position and capacities of the state in International Relations.

Sassen emphasises the digitalisation of the economy and the limited state capacities to regulate the outcomes of that process as one of the most important challenges to the state. At times the digitalisation of the global economy has put the state under heavy economic pressure from corporate global alliances and requests for more deregulatory measures and privatisation. Furthermore, ICT has been commercialised and can be used for better or for worse, even against the state.

Tehranian has been highly sensitive to the fact that the introduction of new information and communications technologies has not only consisted of a mere technical improvement of what went on before. He argues that ICT is both challenging the internal capacities of the state and the external rules of International Relations.

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[51] Tehranian 1999, p. 61.
[52] Tehranian 1999, p. 61.
[53] Tehranian 1999, p. 7, 61, 81, 82.

An important outcome of the information and communications revolution has been that digital networks have enabled novel types of political actors and the rise of global civil society networks:

> The rise of civil society is indeed one of the landmarks of our times. Global governance is no longer the sole domain of Governments. The growing participation and influence of non-State actors is enhancing democracy and reshaping multilateralism. Civil society organizations are also the prime movers of some of the most innovative initiatives to deal with emerging global threats.[54]

The role of civil society organisations and their growing capacities to influence International Relations and International Law is not new.[55] What is new, however, is the sheer growth of the number of non-state actors participating in International Relations (from 1500 in the mid 1950s, to 25,000 in 2001),[56] and the wide range of issues in which these organisations are getting involved.[57] The specific impact of this development with regard to international economic relations will be discussed more specifically in the next section.

In conclusion, any assessment on how the information and communications revolution has altered the regulatory capacities of states in International Relations is ambiguous to say the least. However, the ICT revolution has significantly enhanced the participation of non-state actors in International Relations. Seeing this development in combination with the ambiguities found in the previous section on the impact of the rise of the global free market, gives rise to the question how one should assess the impact of both developments with regard to the regulation of International Relations today.

3.4 Initial Assessments of Change and Continuity

In the next section, two important reports on the initial responses of the international system to the challenges of the global free market and the ICT revolution will be discussed. The first study consists of a report, at the request of the UN Secretary General, by a panel of eminent persons on the topic of United Nations-civil society relations, which became known, after its Chairman, as the Cardoso report.[58] The second study focuses specifically on the social dimensions of globalisation, and offers a wider perspective on the globalisation and its effects on the existing International Law-system and emerging networks of global governance. This report was issued by the ILO World Commission on the Social Dimension of Globalization under the title 'A fair globalization. Creating opportunities for all'.[59]

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54 A/58/817, p. 3.
55 See the early studies by Haas (1964), and more specifically on the impact of American NGOs on US policies and world politics: Haas (1969).
56 ILO 2004, p. 125.
57 Josselin and Wallace (2001), O'Brien, Goetz, Scholte and Williams (2002).
58 A/58/817.
59 ILO 2004.

The two reports are followed by a discussion of an argument on International Law and globalisation made by Schiff Berman, who has tried, based on recent developments as discussed in the Cardoso report and the report by the World Commission, to sketch the contours of what it might mean to emphasise law, instead of International Law, and globalisation.[60]

3.4.1 The Cardoso Report: Civil Society, the United Nations and Global Governance

The report by the Panel of Eminent Persons on United Nations-Civil Society Relations, (henceforth the Cardoso report), starts by observing that politically active citizens today are more inclined to express their concerns through civil society organisations than through the traditional instruments of democracy, especially when it comes to issues with an international or global dimension. These civil society organisations have managed to create global networks of well-informed activists, parliamentarians, journalists, social movement leaders and others, which give voice to a new phenomenon: global public opinion, shaping the international political agenda and generating a cosmopolitan set of norms and citizen demands that transcend national boundaries.[61]

Growing civil society involvement and emerging global public opinion have not diminished the relevance of the international state-based processes. Nor has it lessened the authority of governments within the state:

> While civil society can help to put issues on the global agenda, only Governments have the power to decide on them. But it is true that many prominent issues of our time have been advanced and shaped by civil society, propelled by the power of public opinion. Consider gender relations, child soldiers, debt relief and landmines.[62]

The Cardoso report presents the growing power of civil society as an enhancement of the existing international system, and not a zero-sum game between states and NGOs:

> Governments alone cannot resolve today's global challenges. Effective strategies must draw on the power of public opinion, the creativity and persuasiveness of civil society, the resources and skills of the private sector and the capacities of many other constituencies.[63]

The traditional intergovernmental process – with states negotiating a global agreement that United Nations agencies and Member States then implement – is being supplemented by a new approach in which likeminded parties come together in a joint initiative for action and policy analysis. The report identifies this new approach as 'global policy networks', which refers to the work of Wolfgang

60 Schiff Berman 2005.
61 A/58/817, p. 25.
62 A/58/817, p. 26.
63 A/58/817, p. 28.

Reinicke.[64] Furthermore, it suggests the formation of global coalitions of constituencies, which it calls networked governance, which could enhance the authority and international stature of the actors involved in global policy making:

> These global policy networks have significantly influenced policy, shaped public opinion and helped to resolve disputes on such issues as crimes against humanity, and involve Southern as well as Northern actors. They came together mostly outside the formal organs of the United Nations, later entering the United Nations fold once they had momentum.[65]

From the viewpoint of the United Nations system, the report gives two reasons to motivate reaching out to and creating a larger role for civil society. Firstly, engaging with civil society helps the United Nations to identify global priorities, thereby becoming more responsive and accountable. Secondly, civil society organisations, but also businesses and local governments, have first-hand information, experience and capacities to meet the challenges of the international community, from local operations to global policy-making.[66]

The Cardoso report expects much from the multi-stakeholder policy networks. But it warns the UN not to overstep its reach and influence. The UN should help to ensure that all necessary parties are included, but it should not seek to own the partnerships. Furthermore, the partnerships should be decentralised. They should not be built upon a single central office, but on the relevant technical unities and country offices. Central (UN) functions should be limited to guiding, monitoring, assisting and ensuring activities.[67]

The report concludes by advocating a paradigm shift in the United Nation system whereby the UN should explicitly convene and foster multi-stakeholder partnerships and global policy networks reaching to constituencies beyond Member States. The traditions of the formal intergovernmental UN process might offer some barriers to that objective. But partnerships and policy networks are expected to have stronger results orientation and providing a surer connection between the organisation's local actions and its global values.[68]

3.4.2 The ILO World Commission: Creating Opportunities for All?

The ILO World Commission on the Social Dimension of Globalization (henceforth 'the Commission'), starts by making the observation that global markets have grown rapidly without the creation of parallel institutions necessary for their equitable functioning. Furthermore, there has been a failure in current international policies to respond adequately to globalisation's challenges, as market opening measures and financial and economic considerations have triumphed

64 Reinicke 1998.
65 A/58/817, p. 33.
66 A/58/817, p. 27.
67 A/58/817, p. 39.
68 A/58/817, p. 72.

over social considerations.[69] The responsibility for the urgently needed rules and policies lies with powerful states and powerful 'players'.[70]

Those powerful states and powerful players operate in a system of global governance. According to the Commission, global governance is not a lofty, disembodied sphere away from International Relations. Global governance:

> ...is merely the apex of a web of governance that stretches from the local level upwards. The behaviour of States as global actors is the essential determinant of the quality of governance...At the same time, how they manage their internal affairs influences the extent to which people benefit from globalization and are protected from its negative effects.[71]

Subsequently, the Commission argues for an ethical network to underpin global governance. This is seriously needed, as the Commission believes that globalisation has developed in an ethical vacuum where market success and failure have tended to become 'the ultimate standard of behaviour' and have weakened the fabric of communities and societies.[72] The actors in this process – states, civil society, business, trade unions, international organisations and individuals – must be inspired by a common universal ethical standard in order to accept their own responsibilities, and be publicly accountable for respecting them in all their transactions.[73]

Having said that, the report then discusses the transition of the post-war (Second World War), order based on the international community of nations, represented by nation-states as their prime actors (although some others were represented in the ILO). This post-war system has evolved into something far more complex today:

> Today, the myriad of actors, both state and non-state, play critically important roles in shaping the evolution of globalization. In addition to the organizations of the United Nations system, they include parliamentarians and local authorities, multinational corporations, trade unions, business groups, cooperatives, religious groups, academia, economic and social councils, foundations and charities, community-based organizations and non-governmental organizations (NGOs), and the media. Global networks bring together diverse groups such as youth and consumer associations, farmers, scientists, teachers, lawyers and physicians, women and indigenous peoples.[74]

The Commission highlights the continuing importance of the role of the State in managing the process of integration in the global economy while protecting clas-

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69 ILO 2004, p. xi.
70 ILO 2004, p. xi.
71 ILO 2004, p. xi.
72 ILO 2004, p. 7.
73 ILO 2004, p. 8-9.
74 ILO 2004, p. 9.

sical public goods.[75] But, at the same time, the Commission strongly argues for more decentralisation of state functions, as the decentralised level seems to be more likely to act more effectively, has better knowledge of real situations and constraints, and is closer to the needs and demands of people.[76] This localisation does not mean isolation, as it might create more opportunities for national and cross-border networking, cooperation and exchange among local authorities.[77]

Beyond the state level of global governance, the Commission is highly critical of the developments at the international level. The international response of both state and non-state actors has been haphazard:

> What has emerged to date is a fragmented and incoherent system consisting of a patchwork of overlapping networks and agencies in the economic, social and environmental fields. There is a wide range of diverse arrangements, including laws, norms, informal arrangements and private self-regulation. In some cases, private actors have created important *de facto* standards that governments and markets cannot afford to ignore.[78]

The Commission illustrates this by referring to the harmonisation of accounting standards and efforts by multinationals that focus on corporate social responsibility, partially in response to much-publicised NGO activism on these issues.[79]

Example: International Accountancy Standards

US accountancy standards have become de facto international accountancy standards. American laws require of every multinational registered at the Wall Street Stock Exchange to comply specifically to American law. In this case any foreign company wanting to register their stock at Wall Street, will also have to organise its finances according to American standards. The Dutch supermarkets multinational AHOLD found this out the hard way.

In 2003, this multinational faced an accounting scandal. Two legal investigations were started. The first one was undertaken by the Dutch authorities concerning any breaches in Dutch company law. The second investigation was undertaken by the American Securities and Exchange Commission (SEC). At the same time two lawsuits were filed in the United States by law firms specialising in clawing back investor money after accounting scandals. Within a month the Dutch organisation had been served US subpoenas for company documents. A Dutch and an American law suit followed.

(source: BBC NEWS at bbc.co.uk/news).

75 ILO 2004, p. 57.
76 ILO 2004, p. 68.
77 ILO 2004, p. 68.
78 ILO 2004, p. 76.
79 ILO 2004, p. 77.

Furthermore, the state rules and policies that have been adopted to counter the negative effects of globalisation have been prejudicial to the interests of most developing countries.[80] In some cases, policy guidelines have become *de facto* rules:

> In strict logic, policy guidelines are distinct from formal rules that govern the functioning of the international financial system. But this distinction is often unclear in practice. For example, the policy guidelines of the International Financial Institutions on issues such as capital account liberalization often operate as de facto rules for developing countries. This is because of the strong influence these institutions have over the policy choices of developing countries.[81]

In conclusion, the Commission notices that, although globalisation has reduced the power and autonomy of states in various ways, powerful states continue to exercise important influence on global governance through their policies and behaviour and their decisions in intergovernmental agencies.[82] But global governance has become too complicated to be managed by states alone. Amongst other things, the Commission advocates a deeper involvement of the private sector in international public policy, offering the greater potential of additional finance for global programmes and expertise and access to business networks.[83] Furthermore, the Commission does not expect that the current tensions in the interaction between civil society, governments and multilateral organisations will go away.[84] Finally, like the Cardoso report above, the Commission ends by discussing the advantages of networked governance, which are multi-sectoral and take many forms and may carry out a number of functions, such as setting international practice, disseminating information or mobilising resources.[85]

3.4.3 Schiff Berman: From International Law to Law and Globalisation

How can International Lawyers make sense of the developments described in both the Cardoso report and the report by the ILO Commission? Legal scholar Schiff Berman argues that in order to understand the cross-border development of legal norms, a move is needed beyond the limiting framework of International Law. This framework was built upon two guiding principles. First, law was deemed to reside only in the acts of official, state-sanctioned entities. Second, law was seen as an exclusive function of state sovereignty.[86] More recently, scholars have started to recognise the myriad ways in which the prerogatives of nation-states are being carried out by transnational and international actors. Although this approach, called the 'transnational legal process', helped scholars to understand the ways in which nation-states come to internalise international or trans-

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80 ILO 2004, p. 78.
81 ILO 2004, p. 90.
82 ILO 2004, p. 119.
83 ILO 2004, p. 123.
84 i.e. The complex issue of reconciling participatory democracy with representative democracy. ILO 2004, p. 126.
85 ILO 2004, p. 127.
86 Schiff Berman 2005, p. 487.

national norms over time, it still seemed insufficient to describe the complexities of law in the context of accelerating globalisation.[87] Schiff Bernman wants to take the interdisciplinary study of International Law one step further:

> ...scholars are coming to recognize that International Law itself needs an expanded focus, one that situates cross-border norm development at the intersection of legal scholarship on conflict of laws, civil procedure, cyberlaw, comparative law, and the cultural analysis of law, as well as traditional International Law.[88]

This new approach does not render traditional law irrelevant but does complicate the picture significantly. Schiff Berman has set out to enlarge the focus of International Law in four different, but overlapping, dimensions. Firstly, he proposes to study law beyond governmental institutions. The second proposal is to study law beyond territorial borders. The third proposal is to study law beyond the Public Law/Private Law Distinction. And, finally, he proposes to study law beyond sovereignty. In many ways, his proposals mirror those made by Sassen.[89]

All four proposals help us to realise that the emerging picture of the interaction between developing arrangements for regulating International Economic Relations and the traditional body of International Law will be diverse, fragmented, and very complicated.

Schiff Berman urges the debate about the changing nature of sovereignty in the context of globalisation to move beyond the 'polarising question' of whether the Westphalian system of sovereign nation-states is dying or not. The central premises of sovereignty – the internal capacity to supreme decision-making and having supreme enforcement authority with regard to a particular territory and population, and the external capacity, the independent position of the state in external relations – need to be reconsidered according to Schiff Berman:

> ...an emphasis on legal consciousness, pluralism and law beyond official governmental institutions exposes processes of normative development that are not beholden to the edicts of nation-states. Likewise, the permeability of borders and the fluidity of community affiliations challenge ideas of inviolate nation-state sovereignty. And the erosion of the distinction between public and private International Law undermines the privileged place of the nation-states as the only players in the public international arena.[90]

While nation-states may not disappear, their sovereignty may well become diffused in order to accommodate various international, transnational, or non-territorial norms.[91] However, the rubric sovereignty itself might be an obstacle. The roots of the idea of sovereignty lie in the use of coercive power, writes Schiff

87 Schiff Berman 2005, p. 488-489.
88 Schiff Berman 2005, p. 489.
89 Sassen 2006.
90 Schiff Berman 2005, p. 524.
91 Schiff Berman 2005, p. 527.

Berman. Yet, the changing structures of norm development and inter-penetration do not always rely on coercive power:

> Rather, we see various forms of rhetorical persuasion, informal articulations of legal norms, and networks of affiliation, that may not possess literal enforcement power. As a result, the study of law and globalization invokes not only the diffusion of norms across territorial borders, but also the fact that legal articulations often cross the supposed conceptual border between "official" law on the one hand, and political rhetoric or non-official legal pronouncements on the other. Holding onto a fixed dividing line between the two may prevent us from seeing broader ways in which legal norms develop and spread.[92]

Schiff Berman argues that without a broader understanding of law which acknowledges non-sovereign (and even non-governmental) articulations of norms, we are apt to ignore such articulations altogether or deny them the status of law and thereby miss the real force these norms have and the way in which they interpret official legal doctrine.[93]

3.5 Analysis

We have seen in the previous sections how the expansion of the global free trade system and the ICT revolution have led to changing and emerging regulatory needs among actors in International Relations and the transformation of regulatory mechanism of International Relations.

In the previous chapter we have seen how International Law developed as the primary tool for nation states to regulate International Relations. However, arguments have been found that seriously question state capacities with regard to regulate the increasing complexities of globalising International Economic Relations. Schwarz and Friedman argued that the global free market system has presented states with a policy 'straitjacket' that has made them very docile to the logic of the free market. If this were true, then the states' capacities to regulate International Relations in response to changing and/or emerging regulatory needs in International Relations have been seriously compromised. Legrain argued against this idea of docile states. He held that the perception of the dominance of the free market and docile nation-states depends more on political opportunism then on reality. He has found no hard evidence that the free market has significantly altered state capacities to regulate International Relations.

The digitalisation of economic transactions, the commercialisation of internet access and growing pressures from multinationals to privatise and deregulate has had a profound influence on traditional structures of national and international governance. The global communications revolution has influenced both the internal and external capacities of the state to regulate. Externally, with regard to International Relations, national borders have become more transparent or seem

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92 Schiff Berman 2005, p. 529.
93 Schiff Berman 2005, p. 556.

almost non-existent (with the exception of China and North Korea) with regard to the transfer of science, technology, information and ideas. On the other hand a new, soft power, has developed which is based on global news, entertainment, advertising and consumer behaviour. Furthermore, this revolution has enabled the rise of cultural and political peripheries against new centres of political and economic power. These cultural peripheries might influence through relatively peaceful anti-globalist and conscious consumer movements or violently through global terrorist networks.

However, whatever the viewpoint one takes with regard to the influence of the global free market and the ICT revolution on states' international regulatory capacities through International Law, the fact is that some new arrangements for regulating International Relations have emerged.

These new arrangements often begin life outside the existing formal organs of International Law. They consist of global coalitions of concerned constituencies (e.g. civil society organisations, multinationals, local governments). Or they consist of one type of actor, such as financial institutions. Within these new arrangements, regulatory solutions are being created that may or may not enter into the interaction with formal institutions of International Law. Furthermore, it seems possible that economically powerful state-actors can practically enforce their internal rules to become globally accepted standards.

In conclusion, we have seen how in the past International Law was flexible enough to cope with most emerging regulatory challenges in International Economic Relations. Apparently we are now seeing something different. Next to existing International Law mechanisms, new arrangements are being created that try to regulate International Economic Relations. These new arrangements are not necessarily derived from existing International Law mechanisms, nor do they always seek recognition or cooperation with exiting international legal frameworks. The picture seems to be far more complicated. Therefore, this study specifically focuses on the complicated interactions between new arrangements for regulating International Relations and the traditional body of International Law. In order to explore those interactions, we will revisit the dimensions of interaction between International Law and International Economic Relations that could help us to observe change and continuity. How have these dimensions been affected by economic globalisation, and can they still provide the necessary building blocks for an empirical framework for conducting case-studies?

3.6 Five Relevant Dimensions Revisited

Chapter two reflected briefly on five relevant dimensions of International Law that helped to observe change and continuity in the interaction between International Relations and International Law. In view of the preceding discussion of economic globalisation, the question rises as to how helpful these five dimensions are for understanding change and continuity in the interactions between emerging arrangements for regulating International Relations and the existing traditional body of International Law? Can these dimensions help us to develop a more ex-

tensive understanding of state and non-state actions with regard to regulating International Relations? Do the five dimensions offer an insight in the effectiveness and legitimacy of emerging regulating networks and their interaction with the traditional body of International Law?

This section will revisit the five dimensions identified in chapter 2 and assess them in view of the rise of the global free market and the information and communications revolution. In the next chapter, these dimensions will be used to create a framework for analysis.

3.6.1 First Dimension: Position

The first important dimension that enables us to observe change and continuity in the interaction between International Law and International Economic Relations concerned the specific position which actors occupy in International Relations. What is their rank, status, the specific place they occupy on the stage of International Relations? Is an actor a key actor or merely a marginal one?

In the previous chapter we have seen how the nation-state slowly became the key actor in International Relations and in International Law. In this chapter recent developments in the political economy were discussed and their likely impact on state and non-state actors in International Relations. We will now try to discern what the specific impact of economic globalisation has been with regard to the first dimension: how has economic globalisation affected our understanding of 'position' in International Law and International Relations?

Firstly, we have seen a significant growth in the number of non-state actors, both non-governmental organisations and multinationals, that operate across national borders. The non-state actors have created new international networks and interactions which cut across the multiple political geographies of existing state sovereignty and International Law.[94] They occupy new positions in International Economic Relations that did not exist before.

Secondly, despite this growth in the number of positions available in International Economic Relations, the role and key position of the state should not be underestimated. Even in the context of the aggressive effects of global capitalism on the political capacities of the state, it retains large capacities to influence public opinion and international policies.[95] It seems that the nation-state has drawn on the institutional adaptation reserves of modern democracy, has developed new policy-instruments and has intelligently used international cooperation pressures to innovate national policies and politics.[96]

Traditionally, the key position of the nation-state in International Economic Relations and in International Law has been defined in terms of sovereignty. In view of

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94 Compare Reinicke 1998: p. 7. See also the Cardoso Report A/58/817.
95 Grande 2004, p. 389.
96 Grande 2004, p. 389-390.

the growth in both number and activities of non-state actors in International Economic Relations and (to a lesser extent) in International Law, Chayes and Chayes have argued that a more adequate way of understanding sovereignty would be to define in it in terms of 'status of an actor' in International Economic Relations:

> The new sovereignty is status, membership, connection to the rest of the world and the political ability to be an actor within it.[97]

In conclusion, the first dimension, on the position of actors will focus on the status, membership and connection to a specific international arena. The definition by Chayes and Chayes also included the notion that an actor has not only to have a certain status, but also the political ability to be an actor. This brings us to the second dimension for observation: capacity.

3.6.2 Second Dimension: the Capacity to Act

Whereas the first dimension focussed on the position of actors, the second dimension will focus on the capacities of actors. Reading through some of the debates it seemed that, in the confrontation between the territorial limitations of the state (*Begrenzung*) on the one hand and the phenomenon of growing transnational (*Entgrenzung*) social relations on the other hand, the capacities of nation-state were seriously compromised, whereas multinationals and non-governmental organisations seemed to have gained more capacities in the process.[98] But is that correct?

Nation-states have been instrumental in the creation of the global free market. The main question seems to be whether nation-states are, individually or collectively, in control of the continuing growth of the global free market and its effects. The control of the process and its effects seems to depend on the relative economic strength of states: stronger states tend to be able to exercise better control than economically weak ones. It furthermore depends on the willingness of political leaders to address the issues intelligently. However, especially political opportunism plays here an important role. Overall, it seems that the economic institutions set up by (richer) states, seem to favour all those who adopt the 'golden straitjacket' of economic policies favouring the global free market. In this respect, the capacities of many states to 'sovereignly' decide over the internal regulation of their economies and the regulation of their foreign economic policies has been extensively compromised by the spread of the global free market. Their position and capacities depend on the economic success of their policies with regard to the spread of the global free market.

Likewise, the information and communications revolution seems to have compromised the nation-state's position and capacities in International Economic Relations. Given the sheer complexity of the issue, the state's capacities to regulate the digitalised part of the global economy are very limited. This has placed corpo-

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97 Chayes and Chayes quoted in Slaughter 2005, p. 267.
98 Grande 2004.

rations in a stronger position *vis-à-vis* states, which results in strong economic pressure on their behalf for more deregulatory measures and privatisation. Furthermore, the new technologies have caused a growing division between the capacities of rich and poor states. But perhaps the most important challenge to the capacities of sovereign nation-states comes from two other developments. First, the international mass media are capable of violating national borders by broadcasting foreign news, entertainment, educational and advertising programs. Secondly, the micro-media of global communications are able to empower hitherto forgotten groups and voices in the international community. Thus the information and communications revolution has led to an empowerment of multinationals and other non-state actors in International Relations.

In conclusion, the growth of the capacities of non-state actors has not necessarily led to diminishing capacities of nation-states. Non-state involvement has led to new roles in International Economic Relations. Multinationals and NGOs may operate as agenda-setting 'norm-entrepreneurs' in International Economic Relations. Civil society organisations are often the first to identify international problems (or problems within national economies) that are not raised or resolved by existing international agreements or through local governmental action. And they can play a role too in the construction of international values and norms that guide future international and national economic policies and practices.[99] Therefore, the second dimension will focus on the capacity of state and non-state actors to act upon perceived or changing regulatory needs in International Economic Relations.

3.6.3 Third Dimension: the Accessibility of Political Arenas

Where are the debates over international regulation actually taking place? Who can enter these debates? Who controls the debates? Where are decisions being made?

In International Law there are formal arenas, such as the United Nations, the ILO or the World Trade Organisation, where debates over international regulation take place. At the same time there are the informal arenas in the global public media, or direct meetings between NGO representatives and representatives of states or multinationals.

Some of these arenas have very strict and formalised rules of entry and participation for actors. For instance, the United Nations has a very detailed policy on determining which NGOs might be permitted to work with the organisation or attend official UN conferences.[100] These rules potentially could exclude legitimate stakeholders which, given their own specific nature, do not fall within the definitions of the UN and are therefore excluded from participation. Other political arenas may, initially, have no formal rules of entry and participation. These rules might come into being later, or not at all.

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[99] See Brown, Khagram, Moore, and Frumkin in: Nye and Donahue 2000, p. 283-284.
[100] See chapter 5.

The dimension of accessibility will be a very useful lens for observing change and continuity in the regulatory patterns (both in International Law and in the emerging new arrangements) of International Economic Relations.

3.6.4 Fourth Dimension: the Legitimacy of the Regulatory Solution

What makes state and non-state actors obey an international regulatory solution? According to Shaw, the acceptance of International Law may depend on the idea of legitimacy. He introduces four specific properties of legitimacy: determinacy (or readily ascertainable normative content or 'transparency'); symbolic validation (authority approval); coherence (or consistency or general application) and adherence (or falling within am organised hierarchy of rules).[101]

Likewise, the question of legitimacy could be expanded to all international regulatory solutions, traditional International Law and emerging regulatory frameworks alike. It seems that the legitimacy depends partially on the meaningful participation of the stakeholders involved. Have all voices been heard, was everyone able to plead their case, or to negotiate a fair deal? International Law and emerging regulatory networks are more than simple sets of rules.

In conclusion, expanding an argument made by Shaw, we could say that International Law and emerging regulatory networks are cultures in the broadest sense in that they constitute methods of communicating claims, counter-claims, expectations and anticipations as well as providing frameworks for assessing and prioritising such demands.[102] Therefore, an important element to focus on when determining the interaction between traditional International Law and emerging regulatory mechanisms in International Economic Relations is precisely the issue of legitimacy. Are emerging regulatory issues considered legitimate because they are based on traditional International Law, or because they are based on meaningful stakeholder involvement, or a combination of both?

3.6.5 Fifth Dimension: the Effectiveness of the Regulatory Solution

International Law and emerging regulatory frameworks function in particular, concrete situations, involving a range of actors from states to international organisations, multinationals and individuals. Therefore, Shaw has argued, it needs to be responsive to the needs and aspirations of such participants. Some have called this 'outcome' legitimacy, others prefer the use of 'effectiveness' of the regulatory solution.[103]

Effectiveness also invokes notions of accountability because someone has to 'evaluate' whether the regulatory solution is delivering the results aimed for by the participants during its creation. Does the regulatory solution solve the problem,

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[101] Shaw 2005, p. 60.
[102] Shaw 2005, P. 63.
[103] See also: Van Bijsterveld 2002, p. 302-304.

are the participants happy with the results? And if not, which actor(s) can be held responsible?

3.7 Conclusion

The transformative processes in the global political economy have led to a differentiated and disaggregated picture of the interactions between International Law and International Economic Relations. Two major forces in these processes have been the growth of the global free market and a revolution in information and communications technologies.

In this dynamic context we have seen how new policy networks have emerged 'alongside' existing state-networks in International Economic Relations. They either consist of global coalitions of concerned constituencies (e.g. civil society organisations, multinationals, local governments). Or they consist of one type of actors such as financial institutions.

Within these new policy networks, occasionally alternative regulatory arrangements have been developed. These new regulatory arrangements are not necessarily being derived from existing International Law mechanisms, nor do they always seek recognition or cooperation with exiting international legal frameworks.

However, it is not very clear how these new arrangements that try to regulate International Economic Relations interact with the traditional body of International Law. Therefore, more empirical research is needed on change and continuity in the regulation of International Economic Relations through International Law or through other regulatory arrangements.

In chapter 2 we developed a tool to observe change and continuity in the interaction between International Law and International Economic Relations: position, capacity, accessibility, legitimacy and effectiveness. At the end of this chapter we revisited the five dimensions of our 'graded lens' to determine how these might be affected by the changes in the global political economy. In the next chapter, we will determine how these five dimensions can become the building blocks for an empirical framework to conduct case-studies. The data from these case-studies might be able to offer us more of an insight into the kind of interaction(s) that exist between new arrangements for regulating International Economic Relations and the traditional body of International Law.

4. Preparing the Empirical Research

4.1 Introduction

The previous two chapters provided an introduction to the historical development of International Law and to current developments in the regulation of International Relations. This introduction offered some initial ideas about these new developments, which do not seem to belong automatically to the realm of International Law. The nature of the interaction between these new arrangements for regulating International Relations and traditional International Law is complex and only partially legible. We therefore need to find critical ways for interpreting the growing complexity of international regulation and the often fuzzy relationships that exist between emerging arrangements for regulating International Relations and the traditional body of International Law.

At the end of both chapters, five dimensions for observing change and continuity in the interactions between International Law and International Relations were discussed: position, capacity, accessibility, legitimacy and effectiveness. In chapter 2, these dimensions remained closely related to the traditional body of International Law. In chapter three, they were broadened to include some of the new realities of International Relations in the context of socio-economic globalisation.

In this chapter we will address the third sub-question introduced in chapter 1: "How can dimensions to observe change and continuity in the nature of the interaction between International Law and International Relations be used (operationalised) in order to create a framework for empirical analysis of change and continuity in emerging arrangements regulating International Relations?" In other words, we have to translate the abstract and sometimes vague notions of position, capacity, accessibility, legitimacy and effectiveness into more specific and concrete, and ultimately observable and therefore measurable, criteria for the interpretation of emerging arrangements regulating International Relations.
After the operationalisation of the five dimensions in the first part of this chapter, the second part will pay attention to the research design and protocol that was followed while conducting the empirical case studies. The third part of this chapter will provide a brief introduction to each of the three cases.

4.2 Operationalisation of the Key Dimensions of the Empirical Framework

Knowledge about the multiple dynamics shaping actual regulatory transformations in International Relations helps us to understand the complex architectures of policy-making and regulation in International Socio-Economic Relations and the interaction with the traditional body of International Law. In order to decipher these dynamics that have produced the highly complex structures, we need some specific and concrete criteria to measure change and continuity in the regulation of International Relations. In the previous chapters we identified five key dimensions in International Relations: the perception and willingness of actors to act; the capacity of actors to act; the accessibility of political arenas; the legitimacy of regulatory solutions; and the effectiveness of the regulatory solution.

In this section we will clarify and operationalise these dimensions. We want to know how we can use these dimensions as observable and measurable criteria in an exploratory framework for empirical research of emerging regulatory practices in International Relations.

4.2.1 Position and Capacity of Global Actors

In chapter 2 we have seen how the nation-state gained an important position in International Law. Yet, this position was never gained at the exclusion of all other actors. There were always some other actors which operated in the political arenas of International Law. Furthermore, within the notion of position of nation-states in International Law some further distinctions could be made. Some states were always a 'more equal than others'. This category changed over the years, from the seafaring nations in the 17th century, to the Christian empires of the 19th century, to the permanent members of the UN Security Council in the 20th century.

In chapter one we noticed the more than exponential growth of NGOs in International Relations during the last few decades. In chapter three, we encountered the more than exponential growth of the number of transnational corporations. Both trends have had an effect on the number of actors that are involved with global governance networks.

Within a global governance network we encounter states and (international) organisations, but also NGOs and transnational corporations. Their position and capacities are not equal. States may rely on (the threat to resort to) military power, transnational corporations may rely on their economic impact and NGOs may rely on their capacity to mobilise public opinion. Their relative influence within a network is partially influenced by their formal position within a network and partially by their factual capacities.

Within existing global governance networks this formal position is likely to be determined by certain (legal) selection criteria. However, the importance of such criteria may be less within new and emerging global governance networks. Therefore, we need to make a distinction between the more or less 'formal' position of an actor in a specific global governance network and the actual position of the actor which is also determined by its capacities of acting adequately within a specific global governance network.

Position of the Actor

Is an actor acknowledged as an important stakeholder in a specific global governance network?

Sources:
Existing Legal Rules, including:
- National Laws
- International Laws

Policy Documents containing:
- Definitions
- General policies on actors applicable to wider context of specific arena
- Specific policies on procedures, including on application, selection, accreditation, representation, affiliation, and consultation of actors;
- Specific policies stating principles, such as the need for transparency, accountability, practical willingness to engage
- Policy papers on interpretation, including of policy rules and memoranda

Observations (based on available materials)
- Position becomes clear from practical acceptance or back-up from other actors
- Position becomes clear from financial commitments of actor in specific area

Important changes can be assumed when small, hitherto ignored, actors or network actors (smart mobs) with no clear chain of command demonstrate the capacity to influence the interests of more-or-less clearly organised state and non-state actors.[1]

Shaping the actor's perceptions and abilities to participate in the political arena are: the position from which they enter the arena; the influence they have on problem definition; their own goals and interests; the stakes and stands taken in the game in the perception of each actor; and the deadlines that force an actor to take a stand.[2] International Law is not only rationally chosen as a solution to a pressing international problem, but also results from compromise, conflict, and confusion of actors with diverse interests and unequal influence.[3] There will be power

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1 For this reason, Slaughter has argued that demonstrated capacities are becoming more important than the formal positions of actors. She has called this paradigm 'the new sovereignty.' The 'new sovereignty' is the capacity to participate in the international and transgovernmental regimes, networks and institutions that are now necessary to allow governments to accomplish through cooperation with another what they could only hope to accomplish alone within a defined territory. (Slaughter 2004, p. 284).

2 Allison 1999, p. 298-299.

3 Allison 1971, p. 162.

differences among the actors, and the strategic choices they make will be based on those differences.

International rules may play an important role in influencing the capacities of an actor in global governance. More so than International Law, international rules potentially provide the complete framework of global governance through the way in which they regulate and constrain the behaviour of actors. They might offer a system of substantive and procedural norms, thereby enabling the actors to make decisions and adjust their behaviour to new developments in the political arena.[4] Playing by those rules might help to strengthen the position of an actor, making its actions seem 'more legitimate' to the other actors and to its own constituency.

Capacity of the Actor

Is an actor capable of acting adequately in a specific arena of global governance? Each actor may have more or less capacity (compared to others) to influence events.

Sources:
Existing Legal Rules, including:
- National Laws
- International Laws

Policy Documents containing:
- rules on procedure, draft rules,
- rules on making proposals and amendments
- rules on communication
- reports of the proceedings

Observations (based on available materials)
- capacity to influence other stakeholders such as the (global) media, legislature, politicians, consumer behaviour, students and universities
- capacity to influence financial positions of other actors
- capacity to create new partnerships between actors
- capacity to set the terms of debate and the agenda
- capacity to negotiate and to implement agreements

Important changes might be assumed when state capacities are seriously affected (restricted) by non-state capacities, or when powerful non-state capacities develop without having any effect on existing state capacities.

4.2.2 Access to Global Arenas

By identifying global governance as consisting of various political arenas, the demarcation of specific arenas becomes important. On the other hand, the use of

4 Fisher 1978, p. 9.

the arena metaphor is a social construct. The decision of the demarcation of a specific the boundaries for a policy game is therefore to a large extent subjective.[5] But at the same time, the demarcation of an arena determines who is likely to have access to it, and who is not.

Wendt, in Social Theory of International Politics, notes that social relations have both an internal and external structure.[6] The external structure of an arena is relational 'not in the sense of being caused by contingent interactions with other kinds, but in the sense of being constituted by social relations';[7] a specific arena, for instance for the global reduction of greenhouse gases, stands in a certain relation to wider negotiations over international environmental policies. Wendt then offers another way of looking at the problem of the boundaries, a way that understands the core of an arena not in the material terms of a larger structure but specifically in terms of its self-organising capacities. He uses the example of the creation of a new state:

> A state's ability to organize itself as a state creates resistance to those who deny its existence... Over time such resistance should bring others' theories about that state into line with its reality – i.e., resistance should lead to 'recognition' of its existence. The fact that a state is constituted by shared ideas does not make this resistance any less objective than the more strictly speaking material resistance of natural kinds. [8]

Applying Wendt's approach to arenas in global governance implies that the process of determining the border of an arena receives much of its impetus from forces 'inside' the space around which the boundary will be drawn. For example, the peace agency of Pax Christi International is primarily the network and discourse of those participants and members inside the peace movement, and not the agency and discourse of outsiders.[9]

Wendt has argued that the border of an arena is partially determined by the self-organising capacities of the actors around an issue, and partially by its 'structural embeddedness' within, and interactions with, the larger context of International Relations. The consequence of this argument seems to be that the border of an arena is not a strict border, but may be open to influences and actors from outside the self-organising core of the arena.

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5 Mansbach 2000, p. 137.
6 Wendt 2001.
7 Wendt 2001, p. 71.
8 Wendt 2001, p. 73-74.
9 Compare Wendt 2001, p. 74, on state organisation.

Access to Global Political Arenas

How accessible is the arena in which a regulatory solution is sought for a global issue? At first the answer seems very simple: an actor has access or it has no access. But there is more, especially when one explores the question how far into the arena an new actor may enter? Is the new participant kept at the sidelines of events, or can an actor fully participate?

Sources:
Documents containing:
- access criteria
- invitations
- rules on representation in delegations of actors
- screening procedures

Reports on events discussing practical access of actors:
- to official meetings
- to the chair of meetings
- to lobby-corridors
- to high profile political leaders
- non-institutionalised dialogue (backrooms)

Media coverage

Important changes can be assumed when the accessibility to certain arenas becomes easier, for instance because strict policy rules controlling access to an arena are lifted, or when actors have been able to gain access through their demonstrated capacities to influence another actor's interests (in other words, when they can no longer be ignored). Finally, an important change can be assumed to have occurred when actors which were kept at the sidelines of events suddenly move to the core and start participating in full.

4.2.3 Legitimacy and Effectiveness of Emerging Global Governance Regimes

What is the legitimacy of emerging global governance regimes? And can a new regime really be effective? In fact, the questions of legitimacy of the law and the question of effectiveness of the law are intertwined.[10]

To begin with, Raustiala and Slaughter, but also Van Bijsterveld,[11] have noted the growing importance of regime transparency in studies of the legitimacy and effectiveness of global governance arrangements .[12] Van Bijsterveld has noted that within the alternative steering methods and constructs of self-regulation in Inter-

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[10] See Verdross and Simma 1984, p. 51-54, in this view effectiveness refers to a regular proceeding of the law: regelmäßige Wirksamkeit.
[11] Bijsterveld 2002.
[12] Raustiala and Slaughter 2002, p. 550.

national Relations the static notion of legality seems to be overarched by the dynamic notion of 'transparency'. The principle of transparency requires clarity with regard to decision-making, actions and policies. Legality is but one particular expression of the principle of transparency. [13]

Thus it seems that, if we want to understand the legitimacy of emerging global governance regimes, we will have to look at various dimensions of transparency with regard to the input of actors in a arena and their behaviour during a particular policy 'game'.

Legitimacy of Emerging Global Governance Regimes

The legitimacy of emerging global governance regimes depends on their transparency. Is it clear which actors are involved in a process (input legitimacy)? Can the actors that are involved in the development of regulatory answers to international problems be held accountable? Is it possible to see which actor did what (process legitimacy)?

Sources:
On Input Legitimacy:
- scientific actors
- non-state actors
- partnerships
- Guidelines
- Statements on Commitments

On Process Legitimacy (transparency)

Rules:
- Rules on attendance
- Rules on communication
- Rules on access

Reviews:
- Monitoring criteria and procedures
- Statements on the Obligations of participants
- Peer-based review systems

Control
- Coverage on access to meetings
- Certification procedures
- Complaints procedures

Closely related to the legitimacy of the regulatory answer created in a political arena, is the question whether this 'regulatory answer' actually solves the prob-

[13] Bijsterveld 2002, chapter 2.

lem. The legitimacy and effectiveness of a specific global governance regime does not only depend on the meaningful participation of all stakeholders in a particular issue, but also on the outcome process of this participatory process. In other words, the effectiveness of global governance regimes is a sort of outcome legitimacy.

Effectiveness of Emerging Global Governance Regimes

The effectiveness of the global governance regime itself is the main focus of this dimension for observation. Have the global actors been able to provide an effective regulatory answer? As global governance networks may, especially from the point of International Law, be considered to be inferior, gaining an equal status to International Law in practice may be interpreted as a important change.

Sources:
- approval (afterwards) by states
- official ratification
- signed agreements

Control
- audits
- accountability for failures

Changes in Behaviour
- compliance with outcome
- compliance with standards
- expansion of network

Pressure
- consumer behaviour
- incentives
- threat to use pressure
- media pressure and 'smart-mob' actions

Sanctions
- public naming and shaming
- reports

4.3 Research Design and Protocol

4.3.1 The Main Question

Much has been written about the history of International Law. Likewise, there is a flood of publications about the effects of globalisation and the creation of global governance networks. But little is yet known about the nature of the interaction

between traditional International Law and emerging new regulatory networks. Therefore, the main question of this study is:

What is the nature of the interaction between new arrangements for regulating International Relations and the traditional body of International Law?

The character of this part of the investigation remains largely explorative. Therefore an approach of using case studies and additional examples has been chosen. Case studies [Note: there is no hyphen in case study.] enable a more detailed focus on developments because they allow for various data-collections to be used simultaneously.[14] The examples are distilled from work conducted by other researchers and re-examine these works with regard to possible implications relevant to the central thesis. The dynamic 'advantage' of this approach enables the taking into account of new and or unexpected developments when seeking theoretical insights in a relatively new field of studies. [15]

4.3.2 Case selection

How does an issue become a 'problem' on the global agenda? Today the answer to this question seems largely determined by the role of the mass media enhanced by modern information and communication technologies. Goldstein has called this the 'world news story':

> To an increasing extent, everyone in the world follows the same story line of world news from day to day...To some extent, there is now a single drama unfolding at the global level...The fact that everyone is following the same story reflects the globalizing influence of world communications.[16]

According to Lomborg, the long and winding path between an event taking place in the world and its possible appearance and placement in the media has had three consequences on the conception of international problems. First, the incoherent information provided by the mass media provides the actors with too little knowledge of concrete problems to enable them to take part in decision-making processes. Secondly, the actors might feel sufficiently comfortable that they believe that they actually do have sufficient knowledge to partake in the debate and to make valid decisions. Thirdly, Lomborg warns that the actors will often have a far too negative and distorted impression of problems.[17]

We have seen in chapter 3 that the two major driving forces behind socio-economic globalisation were the global spread of the free market and the information and communications revolution. In the slipstream of these developments many have raised voices of concern with regard to the protection of the environment, the protection of human rights and the protection of labour rights.[18] Espe-

[14] Donk 1997, p. 33.
[15] Compare: Donk 1997, p. 33. See also Sassen 2006.
[16] Goldstein 2001, p. 470.
[17] Lomborg 2001, p. 39.
[18] Alston 2004, Graham 1997, Herz 2002, Heslam 2002, Klein Goldewijk 2005, Meijer 2002,

cially in opposition to the spread of a global free market many publications have been written and global coalitions of concerned constituents have been created.

The selection strategy behind the case studies aimed at finding cases that fell well within the complex architectures of regulation that aimed to seek regulatory solutions with regard the (perceived) effects of the spread of the global free market on the environment, the protection of human rights and the protection of labour rights

4.3.3 Data collection

Given the complexities of the interactions between a specific game and its larger international context, and adding the (potentially) large number of possibly relevant actors and the abundance, in some cases, of publications on the subject, the largest part of the case descriptions rests on document analysis for obvious practical reasons. The documents came from a wide variety of sources. The variety of documents studied consisted of:

- Official Documents. This refers to governmental reports, recorded discussions in parliament, official press releases by the US President and the UN Secretary-General, official UN documents containing minutes of the meetings of the UN General Assembly and the Security Council, official press releases and publications from non-state actors like yearbooks and special reports;
- News sources. This refers to news reports as posted on the websites of CNN and the BBC;
- Books consisting of general publications that used a sociological approach to look at globalisation, and specific books that came out after specific events in a case.
- Articles published by participants at meetings or by journalists, whether in legal journals, newspapers or foreign policy magazines.
- Websites. In all the cases it has been possible to use websites that belong to the specific policy networks described. In almost all cases these websites contained up to date information on the developments of a case.

4.3.4 Within Case Design

Every case was studied in several phases. The first phase consisted of a brief orientation in current debates on globalisation and International Relations using literature, Internet resources, and discussions in several leading foreign policy journals. From these conversations a list of about 50 potential 'new' issues in International Relations in need of international regulation was created. Based on conversations with several International Relations experts, this list was then brought down to three large cases in which concerns for human rights, labour rights and/or the environment converged.

Porter 1991, Genugten e.a. 2004.

In the second phase, explorative conversations took place with academic experts working within specific fields of International Relations and International Law.[19] The aim of these conversations was to find out whether these cases had enough potential with regard to determining change in International Law practice and in the availability of resources.

In the third phase of the research project, data for each case was sought and studied. The data came from recent publications, leading journals, and official Internet sources, such as the UN website. The study of the materials was structured by the main questions of this book. The empirical descriptions of the history of events have, when possible, been discussed with academic experts to check whether they contained all the necessary information and correct interpretations.

Based on the main questions of this book, the empirical data were used to write a description of the political context of a case. This description of the context specifically paid attention to the political and societal developments that influenced the role and position of the main actors in the political arena. It gives an impression of the context and influence of the acceleration of globalisation in a specific area of International Relations.

This description was followed by a closer reading of the available materials in order to determine the content of the game: which rules of governance could be identified? The protocol for the description of the case studies is based on the following outline:

[19] The list of experts includes: Professor Dr W.J.M. van Genugten, Professor Dr P.C.M. van Seters, Professor Dr J.M. Verschuuren, Professor K. Zoeteman, Professor emeritus Dr F.A.M. Alting von Geusau, Professor emeritus Dr Th. Beckers, Dr. S.C. van Bijsterveld, Dr R. Pierik and Dr A.H. Vedder (Tilburg University), Dr S.M. Thomas (University of Bath/Calvin University), and, finally; Dr G. Sen, Dr R. Arabsheibani, Dr A. Mussorov for sharing their insights during my stay at the London School of Economics in 2003.

TABLE

Protocol for the description of the Case Studies

Part	Description
Introduction	Contains a brief description of the selection of the case and its context and content
Case-description	Description and analysis of the position of the actors in the political arena Description and analysis of the capacities of the actors in the political arena Description and analysis of the accessibility of the political arena Assessment and analysis of the potential legitimacy of the political events - input legitimacy - process legitimacy Assessment and analysis of the potential effectiveness of the regulatory outcome.
Analysis	Discussion and interpretation of the main findings of this case.
Conclusion	The conclusion of each case description contains a brief recapitulation of the main findings in this case.

4.3.5 Within Case Analysis and Between Case Analysis

The analysis within each case focussed on the five dimensions as set out in section 4.2: sovereignty as position and capacity, accessibility of the arena and the legitimacy and the effectiveness of the outcomes. Chapter 8 will compare the individual findings of the cases and examples. This is done in order to determine whether certain patterns might be developing which could help to explain why in some cases International Law is the basis, and in other cases it is not necessarily the basis, for emerging global governance mechanisms.

4.4 An Introduction to the Cases

4.4.1 The Kyoto Protocol

The first case concerns the problem of global warming and the need for the reduction of the emission of greenhouse gases. Although states have not actively sought to put this issue on the international agenda, it had become part and parcel of International Relations by the mid- 1990s.

Interestingly, states have considered themselves to be the primary actors capable of dealing with this issue.[20] They coordinate their efforts through the United Nations, which has developed institutions, scientific research projects, and negotia-

[20] For a critical assessment of that assumption see: Lomborg 2001.

tion rounds to tackle this issue globally. The Kyoto negotiations took place within this highly developed and highly integrated network of the United Nations system. This arena (or network of arenas) is accessible for non-state actors, but under strict rules and policy guidelines. They are not considered to have the same status as state actors and their capacities are importantly restricted on paper, when compared to state delegations.

The restriction on the access, position and capacities for non-state actors did not mean that they could only play a minor role during the negotiations. Through their presence they made important (informal) contributions to the debate, because, as stakeholders in the lobby corridors, they informed state delegations of the implications of the proposals for the environment and for their constituencies. Moreover, through their presence, and constant media-coverage, non-state actors helped to make the negotiations more transparent to the general public.

The outcome of the negotiations, the Kyoto-protocol, has gained widespread (public) support throughout the world, although the number of needed state ratifications to put the protocol into place was only reached in the autumn of 2004 by means of a trade off between the European Union and Russia over the latter's application to the World Trade Organisation. The United States has constantly questioned the legitimacy and effectiveness of the outcome of the negotiations, and although its government signed the Treaty, the US Congress has made clear that it has no intention whatsoever to ratify the protocol.

4.4.2 The Fair Labor Association

Not all problems start off immediately at the international level. Sometimes an issue is first recognised as a national problem and, after a while, the interconnectedness of the problem with larger international developments helps to place it on the international agenda.

The political discussion leading to the formation of the Fair Labor Association began in the United States in 1996 through a public reaction to reports on child labour employment by Nike. At first, the concern over working conditions in the apparel industry were US consumer concerns, and when these consumers started (boycotting) actions they subsequently became political concerns. This makes Fair Labor Association almost a textbook example of the sub-politics of globalisation.[21] Sub-politics is the politics of interest groups, social movements, activism, and advocacy groups whose interests radiate out beyond the sphere of institutional politics and whose targets include power centres other than the state, in this case American based multinationals.

[21] Subpolitics was first mentioned by Beck in 1997 and it refers to the politicization of situations, practices, and processes that comes from below the formal political system (from non-elites) and from outside it. It operates at both more localized and more globalized levels than official politics and institutional supports: Knight and Greenberg 2002, p. 554.

Although the US Government had the formal position and capacities to develop policies for the domestic market regarding a ban on all 'sweatshop products', there was little political willingness in the US Congress to do so. Therefore the US President sought a different route, leading to a practical voluntary initiative. Following this strategic choice, NGOs gained access to a new arena, because they were invited to participate in creating this new voluntary regulatory network from scratch. American multinationals, however, needed a little more public (consumer) persuasion before 'voluntarily' entering this new arena.

The input legitimacy of the FLA was ensured through the joint input of NGOs and Multinationals in a Presidential Task Force, without the one being allowed more power than the other, because both were individually and publicly held to account by the US President. The FLA is a fairly transparent network. Its reports can be found on a special website, and are debated in public. Finally, the work of the FLA seems to have an effect on working conditions within the United States and in other countries, through US owned or affiliated producers and domestic subcontractors. This real change in working conditions in the apparel industry helps to create an international outcome legitimacy for a national voluntary regulatory instrument.

4.4.3 The Global Compact

There has been a long debate within the UN over international regulation of corporate social responsibility. But even without answering the question whether the UN in practice would be able to develop such capacities, by the end of the 1990s the state delegations could not agree in principle on whether the UN did have the position to do so. Industrialised countries denied this, while developing countries advocated such a new position and new capacities for the UN. At the same time the UN was in a fiscal deadlock over US contributions. Upon taking up his role as UN Secretary-General, Kofi Annan realised that, among other things, he had to deal with both questions. He did so by joining them together.

Although states would have to be considered to occupy the primary positions and capacities to regulate corporate social responsibility (because a multinational operates within their national borders), they have refrained from doing so in a coordinated way. Bypassing this dead-lock, the UN Secretary-General proposed a compact, asking multinationals and NGOs directly to cooperate in order to protect and ensure human rights and labour rights, and to protect the environment. At the same time, Annan hoped to gain some independent financial support for the UN (also bypassing the states) from the multinationals.

The accessibility for multinationals and NGOs to the Global Compact reflects a practical approach. When the UN formulated the initiative, it fell in line with emerging business trends in corporate citizenship – also referred to as "corporate responsibility", "sustainable growth", and the "triple bottom line", among other terms However there existed no international framework to assist companies in the development and promotion of global, values-based management. And they were certainly not looking for state-regulated regulatory frameworks.

The input of stakeholders comes from the United Nations itself, multinationals and non-governmental organisations. The transparency of the process is low. Detailed reports on practical effectiveness have been written and discussed but are not available to the general public. Therefore the outcome effectiveness of the Global Compact is also subject to debate.

4.5 Recapitulation

Under the influence of socio-economic globalisation, International Law and International Relations are undergoing dynamic transformations which seem to destabilise existing meanings and systems. The crucial frameworks of International Law that sought to regulate International Relations are being questioned more and more. Their future in the context of globalisation seems to be dubious or at least fuzzy in view of newly created alternative regulatory arrangements in International Relations.

This exploratory study sets out to develop an understanding of the complex networks and architectures that are being created in recent efforts to regulate International Relations. The main question to which it seeks an answer is:

What is the nature of the interaction between new arrangements regulating International Economic Relations and the traditional body of International Law?

Based on that question four sub-questions were formulated:

1. What dimensions of the relationship between International Economic Relations and International Law have been important in the past during the creation of regulatory responses to emerging regulatory needs, and how can these dimensions help us to observe continuity and change? (Chapter 2)
2. What are the changing regulatory demands in International Economic Relations in the context of socio-economic globalisation, and how have these demands affected important of the relationship between International Law and International Economic Relations? (Chapter 3)
3. How can the important dimensions of the interaction between International Economic Relations and the traditional body of International Law be used to develop a conceptual framework to explore the developments and changes between emerging arrangements for regulating International Economic Relations and the traditional body of International Law in three specific case-studies? (Chapter 4,5,6 and 7).
4. What conclusions with regard to the interaction between new arrangements for regulating International Economic Relations and the traditional body of International Law between can be drawn based on an evaluation of the outcomes of the analysis of the three case-studies (Chapter 8)

Chapter 9 will present a summary of this study and its main conclusions on nature of the interaction between new arrangements for regulating International Economic Relations and the existing body of International Law

The last of these questions will be answered in chapter 8, after a close study of three cases in the following chapters, 5,6 and 7. We will begin by looking at the negotiations over the Kyoto-Protocol in 1997.

5. The Kyoto Protocol Negotiations

5.1 Introduction

During the 1990s climate change became the overriding international environmental concern.[1] Within the political and scientific debates on climate change, the main concern is global warming based on the greenhouse effect. This specific issue reached the international political agenda through the workings of the UN's Intergovernmental Panel on Climate Change (IPCC). In 1990 this panel produced the report Climate Change – The IPCC Scientific Assessment.[2] This report claimed that greenhouse gases (GHGs), resulting from human activities, were substantially increasing the atmospheric concentration of greenhouse CFS, which in their turn cause the global warming effect.[3] Today, the IPPC reports are the foundation for most public policy on climate change and the basis for most of the arguments put forth in political debates.[4]

One of the most significant effects of the IPCC report at national and international political levels was the emergence, and subsequently rapid growth, of 'green' NGOs and 'green' political parties. This led to a growing public awareness and political pressure calling for the introduction of global and transnational environmental institutions, laws conventions and protocols providing measures to combat or to curb global warming.[5]

An important round of negotiations over a global governance mechanism was initiated within the UN Framework Convention on Climate Change (FCCC), which itself had been created in 1992 during the United Nations Conference on Environment and Development in Rio de Janeiro as a result of the IPCC reports and growing public and political pressure. The main objective of the FCCC, which entered into force in 1994, was to stabilize atmospheric GHG concentrations in order to prevent dangerous irreversible interference with the global climate system.[6]

The new round of negotiations was called the Conference of Parties (COP) and was created according to article 7 of the FCCC framework convention. The parties met for the first time in 1995, in Berlin. This meeting gave a specific mandate (The Berlin Mandate) to the negotiators, calling for a system of legally binding quantified emission limitation and reduction objectives (QUELROs).[7] In order to establish this system, an ad hoc group was formed to begin negotiations on this new

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1 Lomborg 1998, p. 258.
2 IPCC 1990.
3 Breidenich 1998, p. 316. For a critical discussion of that specific claim, see: Lomborg 1998, p. 55.
4 Lomborg 1998, p. 259. See, for example, the briefing of the minister of housing, public planning and environmental affairs to the Dutch parliament of October 17 1997: TK 24 785.
5 Heywood 1998, p. 264
6 Breidenich 1998, p. 317.
7 After the Kyoto protocol the term became Quantified emission limitation and reduction commitment (QELRC).

legal instrument for the post-2000 timeframe. This new legal instrument became known as the Kyoto Protocol. The essence of the Kyoto Protocol boils down to having 'industrial and transition economies cut emissions back to 5 per cent below 1990 levels and to freeze them at that level, while allowing developing countries unlimited emissions.'[8] Thus the 1997 Kyoto protocol became highly controversial, taking until 2004 to be ratified (while it only covers policies until 2012), with important economies, like the United States, opting out.

This case-study zooms in on the negotiations during the COP III meeting in Kyoto, from December 1st to December 11th 1997, which led to the creation of the Kyoto Protocol. The next section will introduce the important actors in the political arena and their positions within the arena. Section 3 will look at the capacities of each actor during the whole process leading up to the Kyoto protocol. Were the actors able to influence the decision-making process, and if so, how? Section 4 will investigate the accessibility of the Kyoto negotiations. How did the actors enter this arena? Section 5 will discuss the input and process legitimacy of the negotiations, while section 6 will look at the effectiveness of the outcome of the Kyoto negotiations. Section 7 will discuss some of the implications of the findings of this case study. Finally, section 8 will draw the most important conclusions that can be derived from this case-study with regard to the relationship between a new regulatory arrangement for regulating international (environmental) relations and the traditional body of International Law.

5.2 The Position of the Actors

As a result of its embeddedness within a larger UN framework, the negotiations in Kyoto were first and foremost an affair between state representatives and state delegations. In principle, all countries accredited with the UN could join the FCCC, through signing and ratifying the framework.[9] The third session of the Conference of the Parties was attended by representatives of the 159 parties to the United Nations Framework Convention on Climate Change. Within this category a further distinction needs to be made between 'Annex-parties' and 'non-annex parties'. According to article 4.2 of the FCCC, the developed countries and other Parties commit themselves to more specific policies to take the lead in modifying long-term trends.[10] Furthermore, there were specific rules on the representation of the states. Each delegation had to consist of a head of delegation and such accredited representatives, alternate representatives, and advisers, as it required.[11]

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8 Cline 2004, p. 28

9 The only non-state that became a party to the FCCC in 1992 was the European Economic Community

10 Australia, Austria, Belarus a/, Belgium, Bulgaria a/, Canada, Czechoslovakia a/, Denmark, European Economic Community, Estonia a/, Finland, France, Germany, Greece, Hungary a/, Iceland, Ireland, Italy, Japan, Latvia a/, Lithuania a/, Luxembourg, Netherlands, New Zealand, Norway, Poland a/, Portugal, Romania a/, Russian Federation a/, Spain, Sweden, Switzerland, Turkey, Ukraine a/, United Kingdom of Great Britain and Northern Ireland, United States of America The "a/" refers to countries that are undergoing the process of transition to a market economy.

11 Rule 17 of FCCC/CP/1996/2.

The credentials of these representatives (issued by a head of state, or government or Minister of Foreign Affairs) had to be accepted by the Conference of the Parties.[12]

With regard to the representation of non-state entities, the draft rules, as adopted at COP II, were applied.[13] Article 6 and 7 of document FCCC/CP/1996/2 deal with the status of (non) state entities. Rule 6 states that:

> The United Nations, its specialized agencies, any international entity or entities entrusted by the Conference of the Parties pursuant to Article 11 of the Convention with the operation of the financial mechanism, and the International Atomic Energy Agency, as well as any State member thereof or observers thereto not Party to the Convention, may be represented at sessions of the Conference of the Parties as observers.
>
> Such observers may, upon invitation of the President, participate without the right to vote, in the proceedings of any session, unless at least one third of the Parties present at the session object.[14]

Based on this rule, 15 intergovernmental organisations participated as observers to the third session. They included the European Bank for Reconstruction and Development, the International Energy Agency and the Organisation for Economic Co-operation and Development.[15] The session was also attended by six states that were not parties to the convention: Belarus (which during the process became a party), Brunei Darussalam, the Holy See, Libyan Arab Jamahiriya, Palau and Turkey. Furthermore, 23 UN offices, programs, and specialized agencies, were represented.[16]

NGO-representation within the COP III meeting in Kyoto was guided by article 7 of the FCCC/CP/1996/2:

> Any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention and which has informed the Secretariat of its wish to be represented at a session of the Conference of the Parties as an observer may be so admitted unless at least one third of the parties object.
>
> Such observers may, upon invitation by the President, participate without the right to vote in the proceedings of any session in matters of direct concern to the body or agency they represent, unless at least one third of the Parties present at the session object.

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12 Rule 19 and 21 of FCCC/CP/1996/2.
13 FCCC/CP/1997/7, p. 7.
14 FCCC/CP/1996/2.
15 FCCC/CP/1997/7, p. 47.
16 FCCC/CP/1997/7 p. 17-18.

The interpretation of this article is guided by two other documents: ECOSOC Resolution E/1996/31 on the consultative relationship between the United Nations and non-governmental organizations (hereinafter: ECOSOC E/1996/31) and UNEP policy based on Memorandum UNEP/PS/1996/5 (hereinafter UNEP/PS/1996).[17] The ECOSOC resolution provided in 1997 the main framework of NGO participation at the COP III meeting.

ECOSOC E/1996/31 makes a distinction between NGO participation in ECOSOC and all its member organizations (Part 1 and further) and NGO participation in international conferences convened by the United Nations and their preparatory process (part 7). If an NGO wants to apply for a consultative status with the UN, and more specific ECOSOC, its aims and purposes must be in conformity with the spirit, purpose, and principles, of the Charter of the United Nations (article 1 and 2). According to article 4, NGOs can operate at national, sub-regional, regional and international levels. Furthermore an NGO should have a recognized standing within the particular field of its competence (article 9). It must be institutionalized to a certain extent, having an established headquarters, an executive officer, and a democratically adopted constitution, which has been deposited with the Secretary-General of the United Nations (article 10). The representatives of the organization must have been authorized by the members to speak on behalf of the organization (article 11). And a system of accountability should be in place (article 12). Finally, its financial structures must be clear (article 13). In the end, the Member States, through ECOSOC, decide whether a consultative status will be granted. At the COP III conference, 171 non-governmental organizations were granted access to the negotiation lobby based on this procedure.[18]

If an NGO had no status at ECOSOC, but wanted to participate in an international conference convened by the United Nations, such as COP III, part 7 of ECOSOC E/1996/31 would apply. Such an NGO had to apply to the secretariat of the conference in question (article 43). The purpose of the NGO had to be relevant to the activities of the conference (article 44 a,b). An organization had to be able to prove that it has been active on this issue at national, regional or international levels (article 44 c). It had to provide the secretariat with a list of the members of the governing body and copies of annual reports with financial statements (article 44 d,e). A description of the membership of the organization, indicating the total number of members, the names of the organizations that are members, and their geographical distribution had to be handed over (article 44 f), as well as a copy of its constitution and/or by-laws (article 44f). The decision whether an NGO is admitted was made by the secretariat of that specific conference in close cooperation with the committee of ECOSOC (article 43). In recognition of the intergovernmental nature of these conferences the NGOs were denied a negotiat-

[17] ECOSOC Resolution E/1996/31 of July 25, 1996 on the Consultative relationship between the United Nations and non-governmental organizations; and UNEP/PS/1996/5, memorandum by Executive Director Elizabeth Dowdeswell on UNEP Policy on NGOs and other Major Groups 30.10.1996.

[18] FCCC/CP/1997/7 p. 47-53.

ing role (article 50). The policy lines set out in UNEP/PS/1996/5 made a further distinction between NGOs, and 'other major groups'.
Other 'major groups' were, according to the objectives of this memorandum: scientific and professional associations, service clubs, community-based organizations (CBOs), grassroots organizations (GROs), consumer unions, and Environmental Citizen's Organizations (ECOs). A total of 62 'major groups' were admitted to this conference. Continuation of their participation could only be ensured by a reapplication.[19] In one case in particular, the International Chamber of Commerce objected to the secretariat to a particular representative of a small business NGO, but was rebuffed, because this NGO had met all the criteria of the secretariat. The ICC then tried to put pressure on this representative to stay away from the meetings, but to no avail.[20]

State and non-state actor participation was high, in total, the negotiations in Kyoto were attended by more than 10.000 participants.[21] The American government had been especially liberal in granting accreditation to the negotiation processes. One third of these tended to be scientific by nature, one third had business origins, and one third consisted of environmental organizations.[22] The Greenpeace delegation alone contained 45 members.[23] A very powerful actor was the Global Climate Coalition, funded by major US multinationals. Their 63 members included representatives of the American Petroleum Institute, the American Automobile Manufacturers Association, and the US National Coal Association.[24] In the months preceding this conference, this NGO had launched a multi-million dollar campaign to warn the American consumers against the possible negative effects of internationally agreed-upon reduction measures.[25] A Greenpeace report showed that multinationals were also well represented by the politicians in the official US delegation. This representation in the delegation was based on the amounts of money that the multinationals had contributed to the domestic election campaigns of the delegates.[26] One sector of multinationals completely new to the floor in 1997 was the insurance industry. Their involvement came as a result from an UNEP initiative in 1996 to set up the Insurance Industry Initiative. The aim of this initiative was to get insurance companies to take climate change seriously. It tried to achieve this by involving the companies in the negotiations and by encouraging an effective code of practice. The financial, political, weight of the represented companies at the conference was estimated at $ 2 trillion. However, only six UK companies were involved, and no American companies. Given

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19 FCCC/CP/1997/7 p. 47-53.
20 Leggett 1999, p. 298.
21 Grubb 1999, p. 61.
22 Arts 1998, p. 109.
23 Leggett 1999, p. 292.
24 Leggett 199, p. 290.
25 Breitmeier 2000, p. 155.
26 Greenpeace, Oiling the Machine, Fossil Fuel Dollars Funnelled into the U.S. Political Process, 1997 Accessed on 22.01.03 at www.greenpeace.org. One of the conclusions of the report was that in the 1995/1996 period alone $ 20.8 million had been donated of which 77% went to the Republicans. Not surprisingly the Republicans were fiercely opposed to the Kyoto protocol. These highest paid senators and representatives were the chairs of major committees for instance the Energy and Natural Resources Senate Committee.

their newness to the process, it was difficult for the insurance industry to influence the outcome of the process.[27] The International Chamber of Commerce formed the largest NGO representation. Its 100+ delegation, headed by Clem Malin of Texaco, represented 7,500 members in 130 countries.[28]

In conclusion, although the key positions were held by the state representatives, non-state representatives occupied important secondary positions within the political arena of Kyoto. The most remarkable position was taken by the international business community who managed to occupy positions through creating pro-business NGOs.

5.3 The Capacities of the Actors

With over 10.000 participants involved, in one way or another, in the negotiation possesses, the rules and games of the negotiations were highly complex. This section will look at the capacities of the actors to influence the events in this arena. The official rules important to the game offer important insights into the capacities of especially the state actors.

Initially, the state actors did not accept the rules of procedure that had been proposed by the secretariat of the FCCC specifically for the Kyoto conference. In the absence of a consensus on the rules of procedure, the President (the chairperson) proposed, and the COP agreed, to apply the draft rules of procedure as contained in document FCCC/CP/1996/2, which had been applied before, with the exception of draft rule 42.[29] Rule 42 was on the voting procedure. The oil exporting countries objected to this draft. They maintained that all the decisions by the COP should be taken unanimously, giving each party a 'de jure' veto power, a position unacceptable to many other countries.[30] In this section, a description of the procedure of decision-making will be given, based on the aforementioned document with the specific articles in brackets.

The general meetings of the COP are held in public and the subsidiary meetings are held in private unless the COP itself decides otherwise (rule 30). The quorum of the meetings is one third of the parties; decisions can only be taken by two thirds of the Parties (rule 31). The President decides on the speaking rights of representatives (rule 32). On proposal of the President the COP decided that, during the general debate, the time limit for statements was five minutes by representatives of the Parties and four minutes for all other statements.[31]

States had the opportunity to introduce proposals and amendments to proposals. These proposals had to be introduced in writing and handed over to the secretariat that had the responsibility to circulate the copies to delegations (rule 36).

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27 Salt 1998, p. 162.
28 Leggett 1999, p. 291.
29 FCCC/CP/1997/7, P. 10.
30 Grubb 1999, p. 64.
31 FCCC/CP/1997/7 P. 15.

Four types of motions take precedence over all other proposals or motions, but only in the order indicated (rule 38):

To suspend the meeting

To adjourn the meeting

To adjourn the debate on the question under discussion

To close the debate on the question under discussion

In case of amendments, annexes or protocols to the Convention, the parties had to be notified at least six months before a meeting by the secretariat (rule 37). This implied that such large-scale proposals had to be brought to the attention of the secretariat before that six months period. The conduct of the official communications between the parties during the conference was regulated in section XI of the FCCC/CP/1996/2.

> The parties can only introduce proposals and amendments to proposals in writing; the secretariat shall circulate the copies to delegations (rule 36).

When a proposal has been adopted or rejected, it may not be reconsidered at the same session, unless the COP decides otherwise with at least two-thirds of the Parties present and voting (rule 40). Each Party has one vote (rule 41). Regional organizations shall have the votes of their members; unless their members exercise their voting rights themselves (rule 41). Voting is normally done by show of hands, however on the basis of rule 48, a Party can ask for a secret ballot. Amendments to proposals can be made and be brought in for voting (rule 45-47). In order to prevent the number of amendments and proposals, the President came up with another strategy: the combination of proposals. But it was only after a heated debate, notably with China, that the chairman gained authority to combine the submitted proposals as a formal negotiation text.[32]

In conclusion, all formal capacities of the actors were determined by official UN rules and draft rules which had not been formally adopted by the actors. But what about the informal capacities? The following study of the accessibility of the Kyoto arena will demonstrate some important changes occurring with regard to the informal capacities of actors in the international political arena.

5.4 The Accessibility of the Arena

Two documents, that guided the selection of non-state actors, refer explicitly to accountability as a criterion for access to the network. ECOSOC E/1996/31 demanded that NGOs joining the ECOSOC system would have an 'executive officer' and a 'democratically adopted constitution', which could be understood as an in

[32] Grubb 1999, p. 64.

directive demand of accountability. This is also true for the demand that representatives should be able to speak on behalf of the organisation they represent. Article 12 of this resolution demands explicitly that NGOs must have a 'system of accountability', leaving it up to ECOSOC to determine what a 'system of accountability' is.

NGOs not having a status within ECOSOC, but wanting to join this particular round of negotiations, faced less demanding criteria, but they too had to hand over their constitution and names of organizations that participated. Particularly worth mentioning here is the position of the delegates of the American Congressional delegation. Not only where they accountable to their own electorate, but, as a Greenpeace report pointed out, also to the multinationals, donating to their campaign funds.

But accessibility is not only important when it comes to access to the official arena, but even more to the un-official arena, or corridors of the negotiations were important decisions are being made outside the spotlight of the general public, or even outside the spotlight from most participants.

At the end of the first week of negotiations there was a high sense of urgency among (NGO) participants, but little progress. A short illustration from a Greenpeace press release illustrates the general feeling:

> With only a few days left to reach agreements to protect the climate, the sense of urgency and pressure within the Kyoto conference centre is intense. There are literally thousands of lobbyists and negotiators and journalists milling around. TV screens monitoring the actual talks, exhibition stalls, huddled lobbying in the coffee stands, tonnes of information leaflets, and side seminars are part of creating the pressure cooker.[33]

A small selection of non-state actors had access to the secret meetings between state representatives taking place in the periphery of the official negotiations:

> Like the day before, there was little for the majority of the 10,000 delegates to do except to sit and wait, and gossip. Only those proxy ears and voices inside the secret meetings, such as Don Pearlman on one side and Greenpeace policy director Bill Hare on the other, were able to attempt to influence things at this stage...[34]

Pearlman was the head of the Global Climate Coalition that included representatives of Amoco, Philips, Texaco, and DuPont.[35]

It seems that the high sense of urgency was not shared by the state representatives. One reason might be the absence of a high profile political leader at the ne-

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33 Greenpeace 08.12.1997.
34 Leggett 1999, p. 313.
35 Leggett 1999, p. 10.

gotiations. Therefore, much was expected of the arrival of the representative of the US Administration, Vice-President Al Gore. His arrival at the meeting changed the mood among the states' delegations, according to US Under-Secretary Eizenstat:

> First, the Vice President's trip was dramatic. It energized delegations, as well as giving a very compelling speech. And I think he injected a sense of urgency. Second, having participated in many negotiations, nothing concentrates the attention like an end date. And that certainly was a second factor. Third, the senior ministerial level did not arrive until Sunday, and therefore a lot of negotiating which occurred in the first week was very important to clear away underbrush, but the political decisions could only be made at the ministerial or sub-ministerial level. And that occurred.[36]

When it occurred to the actors that it would be impossible to reach a consensus of a joint implementation on the reduction of greenhouse gases, the United States came up with the plan of Emissions-trading.[37] However, during these negotiations the developing countries had been largely ignored, and they therefore resented this solution.[38] It was this mood of resentment that made the Chair drop the clause on the obligations for developing countries, something that would hinder future US ratification.[39]

Because of a lack of consensus on third world country reductions, the chairman took this specific article out of the convention.[40] On other occasions the chairman simply said: 'there is no consensus, we will adopt the original'.[41] Another account recalls how Chairman Estrada read the sentences of a new article twice, very slowly and then paused:

> He asked if there were any objections and brought down his gavel as India – some say jointly with the EU and China – raised their flags to object. He ignored the flags and stormed ahead to the next paragraph.[42]

This might seem peculiar, but according to some reports the chairman knew that almost every sentence would be opposed as a matter of principle, and that such a complex debate would destroy the negotiations in the final hours.[43] Under a cover of mutual consensus, the protocol had now set out to institutionalise an agreement to disagree on the obligatory nature of the protocol.

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36 97/12/11 Eizenstat.
37 Grubb 1999, p. 89.
38 Grubb 1999, p. 92.
39 The US Congress maintains that the Kyoto protocol is an unfair deal because it is not obligatory to all participants.
40 Leggett 1999, p. 319.
41 Leggett 1999, p. 320.
42 Grubb 1999, p. 96.
43 Grubb 1999, p. 95.

The lack of obligation was to become the main excuse for the United States Congress not to ratify the protocol. Or, as the majority leader of the US senate wrote in a letter to the head of the US senate delegation in Kyoto, senator Hagel; 'I have made clear to the President [of the United States] personally that the Senate will not ratify a flawed climate change treaty'.[44] The reason for this being:

> The Republican Senators today said quite point - blankedly that they're not going to ratify – that the Senate will never ratify a treaty that does not have mandatory limits for third world nations, and the third world spokesman said quite point-blank that that's not even open for discussion.[45]

This has remained the position of the United States to this day. Given this reality, it was very remarkable when US Vice-President Al Gore gave a very different interpretation of the mood in Congress when he arrived during the second week of the negotiations:

> Question: ...In the event a treaty of some accord is reached this week which meets the expectations or is least acceptable to the government of the United States, but which accord is later not ratified by the Senate, does the administration believe that, one way or another, it can or has the power to proceed-absent Senate ratification-to implement the treaty?
>
> Vice President Gore: Oh, I'm sure anything we submitted to the Senate they would ratify. I don't want to be dismissive of your hypothetical, but that would just be a terrible turn of events. It is hard for me to think about that.[46]

The final articles of the Kyoto Protocol deal with issues such as compliance procedures and mechanism and amendments. Article 18 reads:

> The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve of appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non compliance. Any procedures and mechanism under this Article entailing binding consequences shall be adopted by means of amendments to this Protocol.

The penalties for not complying first have to be negotiated, adding a 'protocol' to the protocol. So why should the parties comply? According to Barrett:

> One reason is that they are expected to by customary of International Law. And it is obvious why custom demands compliance. If states could not be relied

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44 Leggett 1999, p. 313.
45 97/12/08 VP Gore briefing at COP, Kyoto.
46 97/12/08 VP Gore briefing at COP, Kyoto.

> upon to act as they said they would act, then what would be the point of entering into agreements?[47]

Barret argues that therefore Kyoto's failure to enforce compliance, because the Protocol does not contain such measures in itself, may be an irrelevance. But this is not the whole story. According to Barrett there could be a different interpretation based on the work of Downs:

> Both the high rate of compliance and relative absence of enforcement threats are due not so much to the irrelevance of enforcement as to the fact that states are avoiding deep cooperation – and the benefits it holds wherever a prisoners dilemma situation exists – because they are unwilling to pay the costs of enforcement.[48]

In the end the decision-making on the protocol almost became desperate as the conference was running out of time. The issue of lack of time was so pressing that at the end of the first week already some 30 delegates had been admitted to the hospital with dehydration and exhaustion.[49] The reports on what happened at the final meeting indicate a desperate attempt to adopt any form of protocol.

In conclusion, the weight of the conference came down to the meeting of the senior ministerial level, which took place at the beginning of the second week of negotiations. At this meeting the most important political decisions were made.[50] Although non-state actors were closely circling the events, only a handful of them were present when decisions were made at the highest levels. But the fact that these actors were present at these high level meetings is telling of the changing capacities of actors now entering meetings that had hitherto been closed to them.

5.5 Legitimacy of the Process

In this section the core dimension of legitimacy will be explored, first with regard to the legitimacy with regard to the input to the political process, looking for examples of accountability and dialogue between the actors but also with the outside world. Secondly, with regard to the legitimacy of the process itself, it will focus on the transparency of the process.

5.5.1 Input legitimacy

The Kyoto-protocol is an initiative that originated in the vast body of UN policies. Through scientific reports and growing public awareness, environmental concerns came to occupy a place on the UN agenda. The dialogue between UN member states was based on the interpretation of scientific findings. However, from the Rio 1992 Conference onwards, more and more non-state actors, NGOs

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47 Barrett 1998, p. 35.
48 Barrett 1998, p. 35.
49 Leggett 1999, p. 306.
50 97/12/11 Eizenstat.

and multinationals alike, wanted to join the negotiations on environmental concerns. This sudden flow of new actors meant that the UN had to create rules on how these actors could enter state dominated networks. Strict rules on entering the arena meant that a certain selection of 'conversation' partners takes place at the 'entry-point' to this particular arena.

The guidelines of ECOSOC E/1996/31 made particularly clear that non-state actors could only enter the dialogue, by way of a consultative status, when their aims and purposes where in conformity with the spirit, purpose and principles of the Charter of the United Nations. This sounds sympathetic to those actors involved with human rights or the environment as they can easily show how their work is in line with the Charter. Yet, it almost excludes point-blank multinationals and other business associations. At first sight, that is, because US multinationals created their own NGO, the Global Climate Coalition, which on paper could confirm with the purpose and principle of the Charter, but whose interests and representatives mirrored the multinationals that created it.

Within the dialogue a certain informal hierarchy seems to be in place that determines which non-state actors will be consulted by state actors at critical times of the process. The Global Climate Coalition and the International Chamber of Commerce were seen to be accepted 'partners' on the one hand, and Greenpeace occupied such a position on the other side, but only in the informal meetings, taking place between state parties. The logic of the hierarchy seems to be the membership of the organisation (either by numbers, or by economic power).

5.5.2 Process Legitimacy

Part of the legitimacy of the regulatory solution that the Kyoto protocol sought to provide to global warming, is provided by the transparency of the process in which and through which this regulatory answer has been created. Therefore, it is important to study the official rules on communications and the role of the NGOs and the media.

The official rules on communications can be found in the FCCC/CP/1996/2-document. This document describes the responsibilities of the Secretariat with regard to the communications prior, during, and after the conference of the parties. The first responsibility of the secretariat is to inform the Parties at least two months before the session on the dates and the venue. The communication to the observers mentioned in article 6 and 7 was less strict, because article 8 does not have a timeframe attached. The only criterion is 'so that [the sessions] may be represented by observers'. The secretariat was responsible for drafting the agenda (rule 10). The agenda had to be distributed at least six weeks before the session (article 11). During the conference (rule 29), the Secretariat should:

- Arrange for interpretation at the session;
- Receive, translate, reproduce and distribute the documents of the session;
- Publish and distribute the official documents of the session;
- Make and arrange for keeping sound recordings of the session;
- Arrange for the custody and preservation of the documents of the session; and

– Perform all the other work that the Conference of the Parties may require.

Much of the negotiations in Kyoto took place behind closed doors. But, with television cameras inside, the non-state actors where able to follow the debates on television screens. The lobbying was quite open and the journalists literally sat in the middle of the action. When meetings were taking place without the cameras present, official state delegation members occasionally slipped out to give the non-state actors updates on the events taking place. Other forms of communication that nation states used included small unofficial meetings of key-representatives[51], press conferences, and direct contact between heads of state.[52]

Although not present at the core negotiations between the parties, NGOs and media played an important role according to contemporary reports, as can be illustrated by the following quote from the Earth Negotiations Bulletin:

> NGOs and members of the 'fourth estate' – the media – played a pivotal role that paralleled the remote negotiations going on between presidents and prime ministers. Their experts provided background information and analyses to delegations ready to listen, their communication experts produced press releases in Kyoto and at home within hours of developments, and their traditional activists staged colourful thought provoking actions ranging from a Friends of the Earth award for the top dirty industries and penguins sculptured in ice...[53]

The media and the NGOs were mixed together in a large hall. The general negotiations could be followed through large screens because inside the central negotiating room there was not enough room for all NGOs and the media. The business NGOs met on one side of the hall, and the all the other NGOs on the other side. Each group had facilities to call closed meetings.[54] The journalists worked at long tables in the middle of this space amid 'the untidy sprawl of press releases from the NGOs'.[55]

In the lobby rooms, NGOs were involved with the traditional lobbying of the delegations and journalists before, during and after the official meetings. They did so for instance by organizing workshops, issuing a 'negotiations bulletin'[56], or catch-

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51 Kyoto report.

52 During COP III, US president Bill Clinton telephoned presidents and prime-ministers from Washington DC and 'asked them' to deal with positions that their negotiation teams were taking in Kyoto that the US delegation was not finding 'helpful' (as stated by the head of the US delegation Eizenstat in press conference 97/12/11 and by vice-president Al Gore in press conference 97/12/08).

53 ENB 13/12/1997, p. 15.

54 Leggett 1999, p. 303.

55 Leggett 1999, p. 300.

56 For instance the 'Earth Negotiations Bulletin' issued by the International Institute for Sustainable Development which came out every day, containing a short summary of the preceding day, important meetings for the day and some background information. There was great concern of the parties to the convention on the volume of the documentation. One of the ways to bring the volume down was through a restricted page on the Internet. Other restric-

ing media attention. During the meetings behind closed doors members of national delegations occasionally slipped out of the meetings to update NGOs on what was going on behind the closed doors.[57]

In conclusion, the question remains whether the NGOs and the media had any significant effect on the outcome of the negotiations, but they seem to have contributed to make the whole negotiating process more transparent and more open than ever before. It might also very well be that their effect was substantially limited because these actors had great difficulty in grappling with and communicating the political and technical complexity of the agreement in the first place.[58]

5.6 Effectiveness of the Outcome

At the 12th plenary meeting, on December 11th, the Conference of the Parties adopted the Kyoto Protocol to the United Nations Framework Convention on Climate Change (FCCC/CP/1997/L.7).[59] The Kyoto protocol was opened for signature on March 16, 1998, for a period of one year. It enters force when 55 nations have ratified it, provided that these ratifications include Annex I Parties that account for at least 55% of the total carbon dioxide emissions in 1990.[60] The Protocol shall enter into force on the nineteenth day after the day that these demands have been met (article 25).

Five years later, on November 26th 2003, the UNFCC published a list of ratification and signatures. At that moment 120 countries had ratified the protocol, accounting for a total of 44,2 % of the emissions in 1990. As major countries like Russia and the United States have not ratified the protocol, despite the US administration signing it on March 16th, 1998, it means that the protocol, five years later, had not entered into force.[61] Finally, in October 2004, Russia's cabinet formally approved the protocol and then sent it to parliament for an untroubled ratification. The trade off came when the EU pledged to support Russia's application for the WTO.[62]

With regard to the outcome of the whole negotiating process it is interesting to note that no state party will be held accountable for not applying the Kyoto protocol demands after their ratification process, for as long as the protocol has not been adopted. There are no incentives, nor means of pressure to start working towards meeting the criteria, for as long as the protocol has not been 'activated'. A system of peer pressure and peer review has not been introduced for the time being. The signatories will perhaps feel a common responsibility for the fact that

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tions were found in limiting the number of translations, limiting hard copy circulation, avoiding repetition and keeping to tight schedules. See decision 18/CP.3 taken at the 2· plenary meeting on December 1· 1997.

57 Leggett 1999, p. 305.

58 See Grubb 1999, p. 64.

59 FCCC/CP/1997/7, p. 28.

60 Article 24 and 25 of the Kyoto protocol.

61 http://unfccc.int/resource/kpstats.pdf, accessed on January 26 2004.

62 The Economist, October 7th 2004.

the criteria will not be met, but individual states will not be held accountable for the failure of the Kyoto-protocol.

5.7 Analysis

One of the long standing roles of nation-state organisations has been to negotiate the national interest within the wider framework of International Organisations such as the United Nations. The negotiations over the Kyoto-protocol took place at an intersection of the national interest of states and growing worldwide concerns over global warming. In this section we will analyse the findings for each dimension of our empirical framework.

Firstly, we will look at the positions of the actors. The initial reports on the relationship between global warming and greenhouse gases were produced by a body of the United Nations. Initially, nation-states seemed not too keen to actively pursue policies countering the causes and effects of global warming as they were concerned for potential negative effects of these policies on their national economies. However, the concern over Global Warming managed to capture attention in the global public square. There, outside state and international structures, the concern over Global Warming lead to the creation of global coalitions of concerned constituencies which used their political and consumer leverage to make their voices heard vis-à-vis official state representatives and (inter)national structures. These coalitions consisted of 'green' political parties, 'green' NGOs and the media. Together they managed to put the issue on the international political agenda as the most pressing international environmental problem of the 1990s.

The fact that the United Nations has had a history with regard to raising concerns over global warming, apparently made it the most natural platform for state-actors to discuss the need for measures to counter the causes and effects of Global Warming. In wake of the outside pressure of concerned constituencies, the UN frameworks provided the state-actors with the relative safety of a political arena where they could occupy the key-positions and have the strongest political leverage.

The nature of non-state engagement with the negotiations in Kyoto varied for different types of non-state actors. The majority of NGOs had access to the UN-network based on an accreditation with the UN. There were some innovations though. Multinationals managed to enter this particular arena by organising their interests in newly created pro-business NGOs which fell well within UN-accreditation criteria. Furthermore, both NGOs and multinationals have some of their national representatives inserted as part of the official state-delegations that were conducting the negotiations. This gave them unique insights and potential influence at crucial stages in the preparatory negotiations leading up to the Protocol. Finally, some state-representatives considered some particular coalitions of concerned constituencies crucial enough to have them present through crucial political deliberations at the highest political levels.

Secondly, we will look at the capacities of the significant stakeholders in the negotiations. Which actor has been capable of acting adequately during the creation of a new regulatory regime in International Relations?

Within the group of state actors the United States played a dominant role. The strong position of the United States was reflected by the large US delegations present in Kyoto. This did not come as a complete surprise, because the US economy is the largest consumptive economy of the world. A profound change in its ecological policies would have a measurable effect on the total emission of greenhouse gases. However, the Republican-dominated US Congress was not convinced of the benefits and success of the proposed protocol. The Republican Congress representatives present in Kyoto made it clear that they would block any agreement by the US Vice-President on binding rules and penalties for the emission of greenhouse-gases as long as some countries had to reduce their emissions while other, Third World, countries did not have to face up to these criteria. Hereby US domestic politics had become international politics for the rest of the world.

The American objections to the protocol were clear to all actors from the outset. When the protocol was adopted at the final meeting without the obligations to the Third World, the participants knew that the US would not ratify it, at that time even signing had become questionable. A protocol on the reduction of the emission of greenhouse gases without the United States, could have meant that it would not be taken seriously. This might explain why the number of Annex I countries needed for ratification was not met until 7 years later, and why the total emission reductions still fall well bellow the target line for putting the Protocol into action.

Thirdly, we will take a look at the accessibility of the arena. The fact that much of the international political and legal development up to the point of the protocol had been taking place in the context of the United Nations, and to be more precise within the FCCC, meant that other actors that entered the arena were doing so within the margins set out by the FCCC-network. The strong position of states made them almost independent of the NGOs and 'cloaked' multinationals present. The dimension of the accessibility of the negotiations shows that the new actors were barely able to enter the inner circle of the negotiations. During the twelve days of negotiating, the state representatives met in special negotiation rooms with little space or access to non-state actors. The non-state actors where able to follow the talks on big screens, or (when they were behind 'closed-doors') depended on state representatives sharing information upon leaving the negotiation-sessions. Yet, some non-state actors managed to get into meetings were the real decisions were being taken, but had no vote. The path of the negotiations was to a large extent determined by the previous initiatives of the United Nations, and the rules that came with those initiatives. Not surprisingly, the 'real' arena was the meeting of senior ministers, which took place at the beginning of the second week, and to which the majority of state delegations had no access. At that meeting, the real decisions were being made, including instructions for the state delegations to work towards the conclusion of the negotiations.

When it came to the official decision-making, the 'end'-game, non-state actors did have no official role. They had to wait outside the rooms where the meetings are taking place, or sat on the few reserved 'observer' seats.[63] In the end, the large state delegations were only there to prepare the way for the real decision-making: the ministers meeting at senior ministerial level. As the ministers arrived relatively late to the process, there had hardly been any chance for the non-state actors to lobby them before their round of negotiations started.

Fourthly, we have assumed in the previous chapters that the legitimacy of emerging global governance regimes for a substantial part depends on their transparency. The Kyoto-negotiations as such were transparent in many ways. On the one hand, through the official channels of conferences, through press bulletins, through the reporting of many journalists and other media, on the other hand, through the unofficial channels, the members of delegations walking out of meetings to talk with the press, the presence of significant NGO representatives at 'closed door meetings'. And during the whole event the world watched the live coverage of the events. Subsequently, the missing details of the negotiations have come out in later years, enabling a reconstruction that offers a fair impression of what went on during those events in Kyoto. Holding actors, based on that information, accountable for the outcome of the negotiations can only be done through the political process of each state.

Finally, the effectiveness of the global governance regime itself is significant in comparison to existing international legal frameworks. Have the actors been able to come up with an effective regulatory answer? The answer to this question is tricky. The results of the Kyoto negotiations are still controversial. It has taken until 2004 before the Kyoto protocol became officially effective. Until that moment, the willingness of state governments to implement the Kyoto protocol was limited and it was a bargain over Russia's membership of the WTO in 2004 that finally brought the Kyoto mechanism into place. Non-state actors had not been able to speed up the procedures for implementation after their initial impact on placing the issue on the global agenda. It was a trade off between states, membership of the WTO vis-à-vis ratification of the Kyoto protocol, that made the protocol a legal instrument. Although not having placed the issue on the international agenda, state actors dominated the response to the issue of global warming. And from that moment, non-state actors could affect events from the side-line. As soon as the ink on the protocol had dried, the Kyoto arena became a specific state-concern once again. Non-state actors were not directly involved in the follow-up after Kyoto.

5.8 Conclusion

In this chapter we looked at the first case-study that might help us to develop a better understanding of the relationship between emerging arrangements regulating International Relations and the traditional body of International Law. The ne-

[63] ECOSOC E/1996/31, article 50 states that in recognition of the intergovernmental nature of these conferences the NGOs will not be able to have a negotiating role.

gotiations in Kyoto provided a complex case-study of the interaction between the highly integrated and highly developed political networks of the UN and the new architectures and networks of concerned constituencies that interacted with the process. Some significant shifts seem to have occurred in the way this interaction took place.

The first shift seems to have occurred with regard to non-state involvement within the UN-network. Although no changes occurred in the official criteria regulating non-state interactions with the UN, the changes occurred at a more practical level. By creating NGOs that fell within the UN criteria for NGO-accreditation, multinationals were able to make their voices heard during the negotiations in places that had hitherto been inaccessible. The same can be said for some NGOs, whose representatives had become part of some official state-delegations. Thereby the distinctions between NGO-representatives, State-representatives, and Business-representatives are becoming blurred. Furthermore, the nature of the actors themselves is becoming fuzzy and blurred as well. If internationally operating non-state representatives become embedded within national state-delegations then this heightens the complexity of understanding whom or what is creating a new regulatory framework and whether this is part of the traditional body of International Law or not.

The second shift seems to have occurred with regard to the effectiveness of the outcome. At first, the Kyoto-protocol seemed to become a dead-letter. As soon as the ink had dried, national governments seemed to be very reluctant to ratify the treaty or to bind themselves to practical policies that would enable them to comply with the protocol should it become effective in the near future. This attitude can be partially explained by the position of the United States. Although the United States influenced almost every aspect of the protocol, including the idea of trading emission rights, it refused to ratify the outcome which it had negotiated for. Yet, initially, and based on historic experiences, any international agreement on global warming without American approval or support looked, given the size of the US economy, doomed to fail.

However, despite national opposition to ratification, we see a denationalisation of international politics within the United States. A growing coalition of states and major cities within the United States has now (2007) joined forces with concerned NGOs, socially responsible multinationals and the media. Together they have decided to implement local measures and policies to comply with the Kyoto Protocol regardless of the opposition to the Protocol expressed by the federal government. Finally, many US manufacturers have found that, with regard to the export of goods and services, they have to comply with Kyoto-criteria as they are becoming used as part of import restrictions by other countries.

In this case we have seen how the creation of a new regulatory arrangement trying to coordinate worldwide policies with regard to the emission of Greenhouse gasses was firmly embedded within the institutions of International Law. But, even within this embedded network, we have discovered new complexities of interaction and policy-making that seem to develop in directions beyond the traditional

body and structures of International Law. In Kyoto, the formalised institutions and distinctions between state and non-state actors seem to have undergone some foundational changes. States can be (partially) represented by NGOs, multinationals can become NGOs, and local state-organisations can comply with international agreements even when national state-representatives will not do so. Overall the picture is one of fuzziness, transformations, and growing complexities. But, in the words of a Canadian minister for the Environment: 'it is a start, and at this moment, it is the best we have'.[64]

[64] Canadian minister for the Environment David Anderson speaking on the eve of the Canadian ratification of the protocol. Duin 2002, p. 8.

6. The Fair Labor Association

6.1 Introduction

Bad working conditions in the apparel industry are often used by NGOs to raise public awareness of the negative effects of globalisation.[1] As such, sweatshops have become to symbolise 'bad globalisation', and companies try to avoid working with them out of fear of consumer boycotts. Despite the high symbolic presence of sweatshops in anti-globalisation debates, the sectors in which sweatshops are concentrated – clothing, shoes, sport goods and toys, account for less than 10 percent of the total world goods export.[2]

One of the results of the raised public concern for the production of consumer goods has been the labelling of consumer goods as being 'sweatshop-free'. Among the early initiatives to introduce a labelling system was the White House Apparel Industry Partnership (1996), which in turn led to the creation of the Fair Labor Association (FLA). The FLA is the result of a public debate in the United States over the need for some sort of regulation, and the subsequent work of a Presidential Task Force. This chapter explores the relationship the Fair Labor Association and the existing body of International Law with regard to multinationals' responsibilities for working conditions in sweatshops.

The FLA seems to contain some sort of international 'rules'. The FLA itself resembles a pseudo-legal order. Pseudo, because it is not part of the domestic or international legal order. It's status is more like a policy network, with a more formalised system of peer pressure, public pressure and independent assessments of practices to enforce rules. The reach of the FLA is global because many US multinationals operate through subcontractors around the world. The working conditions in the factories of these subcontractors are subject to the FLA controlling system.

This case study follows the framework set out in chapter 4. After having introduced the actors and their positions, we will take a closer look at their capacities during the creation, implementation and subsequent functioning of the FLA.

6.2 The Position of the Actors

The Fair Labor Association has been set up as non profit association under American Law. It is made up of a Board of Directors, Participating Companies, Affiliated Colleges and Universities, and Independent External Monitors.

The Board of Directors consists of 16 representatives, six from industry, six from labour organisations and other NGOs, three university representatives and an in-

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1 Klein 2000-2, Friedman 1999, Knight and Greenberg 2002.

2 Legrain 2002, p. 64.

dependent chair. The chair is selected by a committee from the board of directors.[3] The other representatives are chosen through peer selection by the groups:

> The industry Board Members shall be selected by a majority of Participating Companies...in the Association. The Labor/NGO Board Members shall be selected by a majority of then-serving Labor/NGO Board Members. The university Board Members shall be chosen by the University Advisory Council.[4]

Companies can become members when they undertake 'in good faith' the following:

1. To adopt, and cause its applicable licensees, contractors and suppliers to adopt, the Workplace Code in the manufacture of its products;
2. to formally convey the Workplace Code (in the applicable local language) to company factories, and applicable licensees, contractors and suppliers, and communicate the company's commitment to comply with the Workplace Code to senior officers, managers and employees of both the company and its applicable licensees, contractors and suppliers;
3. to implement a system of internal monitoring that complies with the Monitoring Principles;
4. to submit its Applicable Facilities to unannounced monitoring visits conducted by accredited independent external monitors assigned by the FLA staff...; and
5. to pay annual assessments to the Association. Assessments shall be determined by the Board of Directors of the Association based on a formula related to the annual revenues of each Participating Company. The minimal annual assessment for each Participating Company shall be $ 5000.[5]

The Board of Directors of the FLA determines whether a company is eligible to participate. On March 1st 2004, eleven companies had been found eligible to participate.[6]

Colleges and Universities face fewer demands when joining the FLA. They become affiliated members through the University Advisory Council. There are five categories within this group. The first two (A, B depending on consolidated revenues) are required to undertake the same requirements associated with the Participating Companies. The other categories (C, D) are "watered down" obligations with lesser obligations and restrictions.[7] On March 1st 2004, more than 1100 colleges and universities were affiliated members.[8]

The selection of independent external monitors is, understandably, very critical. The main concern of the whole association is that the monitors are independent:

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3 Charter Document FLA, p. 7.
4 Charter Document FLA, p. 6.
5 Charter Document FLA, p. 11.
6 www.fairlabor.org accessed at March 1st 2004.
7 Charter Document FLA, p. 13.
8 www.fairlabor.org accessed at March 1st 2004.

> Neither the independent external monitor nor any of its employees personally involved in the monitoring of a Participating Company or College or University Licensee shall have any business or financial relationship with, including holding any equity or debt securities of, the Company or Licensees, contractors or suppliers that would conflict with or compromise its ability to conduct monitoring in a neutral, impartial manner; and
>
> The independent external monitor shall not provide other services to the Participating Company or College or University Licensee, or shall not have provided other services to the Company or Licensee in the twelve month period prior to its consideration to be an external monitor...[9]

This position has to be maintained throughout the whole period of the involvement of the external monitor with the FLA. Furthermore an independent monitor should have the following qualifying characteristics for each country for which it seeks accreditation:

- Background knowledge (on the business and the local culture)
- Demonstrated ability to monitor workplace conditions
- Demonstrated ability to analyse and report
- Willingness to undergo a trail period with the FLA before accreditation
- Willingness to accept accountability to the FLA for 'professional misconduct or gross negligence in the conduct of its monitoring or the preparation or content of its monitoring reports'.[10]

There are currently 12 leading brand-name companies participating in the FLA. These are Adidas-Salomon, Eddie Bauer, GEAR for Sports, Gildan Activewear, Liz Claiborne, New Era Cap. Nordstrom, Nike, Patagonia, Reebok, Philips-Van Heusden and Zephyr. Colleges and universities joined the FLA in order to promote fair and decent conditions in the production of goods bearing their logo. By early 2004, there were over 175 colleges and universities affiliated with the FLA.[11]

Through an NGO network, called the NGO Advisory Council, the FLA is trying to cooperate with labour NGOs. This network aims to be both a resource for the FLA and for the NGOs involved. The FLA encourages NGOs who are interested in collaborating with the FLA and its stakeholders to join the network. The NGO Advisory Council currently has members in Cambodia, El Salvador, Guatemala, Indonesia, Malaysia, Mexico, Pakistan, Philippines, South Africa, Taiwan, and the United States.[12]

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9 Charter Document FLA, p. 15.
10 Charter Document FLA, p. 16-18. There are 12 auditing organisations cooperating in this initiative, www.fairlabor.org accessed at March 1st 2004.
11 www.fairlabor.org accessed at 10.02.2004.
12 www.fairlabor.org accessed at 10.02.2004.

In conclusion, the FLA contains a whole range of non-state actors that traditionally do not belong to the arenas of International Relations, most are the universities and colleges.

6.3 The Capacities of the Actors

In 1993, US Labor Secretary Reich announced initiatives to fight sweatshops. In the subsequent years, the US Labor department organised some conferences and roundtables on the issue. In December 1995, Reich announced a "Trendsetter" list containing retailers and manufacturers that were working to end the practice of sweatshops in the United States.[13] In that same year, the sweatshop issue hit the American media with a scandal in El Monte, California, were 70 people were working in a sweatshop behind barbed wire.[14] Over the next few months, investigative journalism linked companies, and products by Gap, Nike, and Kathie Lee Gifford, to the sweatshop issue. A public reaction followed, consisting of consumer boycotts, e-mail bombardments, and protest marches in the United States and subsequently spreading to various place all over the world.[15]

By August 1996, the public reactions, consumer boycotts, and the subsequent political debates, had become strong enough to convince U.S. President Bill Clinton to establish a presidential task force, the Apparel Partnership Initiative, in which corporations and some representatives of labour and NGOs were 'invited' to develop minimal standards at apparel factories in the U.S. and abroad.[16] There was a direct link between public reactions and the President's actions, according to Assistant Attorney General, Joel Klein, in 2000:

> In response to publicity about...working conditions, President Clinton, in August 1996, convened a meeting of United States apparel and footwear manufacturers, as well as labor unions, consumer, human rights, and religious organization representatives, and urged them to develop standards for working conditions that would eliminate sweatshop working conditions, and to allow adherents to those standards to convey the fact of such adherence to the consuming public.[17]

During the press conference in the Rose Garden, the President set out the aim of the presidential task force:

> Our nation has always stood for human dignity and the fundamental rights of working people. We believe everyone should work, but no one should have put their lives into jeopardy to put food on the table for their families. That's why I am pleased to announce that the companies gathered here today have agreed to begin working together to put an end to this problem.

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13 AIPA, 14.04.1997.
14 OPS, 12.09.1996.
15 Klein 2000-2, pp. 366-379, Bullert 1999.
16 Bullert 1999, p. 7.
17 Klein 2000-1, p.1.

> They have agreed to do two things. First, they will take additional steps to ensure that the products they make are manufactured under decent and human working conditions. Second, they will develop options to inform consumers that the products they buy are not produced under those exploitative conditions. They have agreed to report back to me within a maximum of six months about their progress.[18]

The Presidential task force consisted of 18 members from the business world (including Nike) and civil society (including The Interfaith Center on Corporate Responsibility, the Lawyers Committee for Human Rights and the Robert F. Kennedy Memorial Center for Human Rights).[19] Within a year this task force would come up with its first results.

At the same time, legislation was introduced in the US House of Representatives, the Child Labor Free Consumer Information Act, which sought to introduce a voluntary labelling system for products that had not been produced through child labour. The reasons for the 'voluntary' nature of the labelling system was, according to the representative George Miller, that consumers liked this and it would not hinder international trade obligations.[20]

On April 14th, 1997, the Presidential Task force presented the results of its deliberations to the President. President Clinton was satisfied with their results:

> Now, here's what they agreed to do: first a workplace code of conduct that companies will voluntarily adopt, and require their contractors to adopt, to dramatically improve the conditions under which goods are made. The code will establish a maximum work week, a cap of 12 hours on the amount of overtime a company can require, require that employers pay at least the minimum prevailing wage, respect basic labor rights. It will require safe and healthy working conditions and freedom from abuse and harassment. Most important, it will crack down on child labor –prohibiting the employment of those under 15 years of age in most countries.
>
> It will also take steps to ensure that this code is enforce and the American consumers will know that the tenets of the agreement are being honoured.[21]

The Apparel Industry Partnership addressed the issues specifically with the aim of eradicating sweatshops in the United States and abroad. In their view, the formulations of the standards in the agreement defined decent and humane working conditions. Its main concern, according to the text of the agreement (a Workplace Code of Conduct), seems to have been consumer perceptions:

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18 OPS, 12.09,1996.

19 AIPA, 14.04.1997.

20 US House of Representatives 1996, p. E 1658 – E 1660. At the same time US Senator Tom Harkin introduced a likewise proposal in the Senate (H.R. 4125 / S. 2094). The measures were referred to the subcommittees in Congress. They did not become law.

21 OPS 14.04.1997.

> The partnership believes that consumers can have confidence that products that are manufactured in compliance with these standards are not produced under exploitative or inhumane conditions.[22]

These workplace standards were developed by multinationals and NGOs on the invitation by the President, in a reaction to the public outcry over the sweatshop issue. What the initiative now needed was an enforcement mechanism.

Agreement on the enforcement mechanism took significantly longer than the first agreement on the standards. In November 1998, a sub-group of the partnership comprising four of the companies (Liz Claiborne, Nike, Patagonia, and Reebok) and four of the human rights groups (the International Labor Rights Fund, the Lawyers Committee for Human Rights, the Robert F. Kennedy Memorial Center for Human Rights and the National Consumers League) negotiated a preliminary agreement on establishing the Fair Labor Association to oversee monitoring of the Code.[23] The Fair Labor Association was formally established in 1999 according to American Law, and is based in Washington, D.C. The mission of the Fair Labor Association is:

> ...to combine the efforts of industry, non-governmental organizations (NGOs), colleges and universities to promote adherence to international labor standards and improve working conditions worldwide.[24]

The FLA has seven purposes. First, it is to accredit independent monitors and ensure high professional standards in the conduct of independent external monitoring. Secondly, it is to verify, evaluate and publicly account independently for the internal compliance programs of each participating company so as to serve as a source of information to consumers. Thirdly, it has to certify whether brands of a participating company are produced in compliance with FLA standards. Fourthly, it conducts programs to allow Colleges and Universities to become participating companies. Fifthly, it works with agents and suppliers to facilitate programs that lead to greater and sustainable commitment and capacity of individual factories to respect labour rights and improve conditions at work. Sixthly, it will address questions critical to the elimination of unfair labour practices. Finally, it will serve as a source of information to the public about the Workplace Code and the Monitoring Principles.[25]

In conclusion, a combination of state capacities and resources and newly discovered capacities of public pressure groups and other NGOs helped to create a new regulatory initiative to address working conditions in clothing manufacturing.

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[22] AIPA, 14.04.1997.

[23] Connor 2001, p. 29. Three other NGOs decided that they would not continue this track because they found the proposed monitoring system 'unacceptably weak'.

[24] Charter Document FLA, p. 1.

[25] Charter Document FLA, p. iii.

6.4 Accessibility while creating an Arena

The FLA started as a dialogue between representatives of companies and NGOs on the invitation of President Clinton. The rules of the founding charter reflect an institutional concern to keep this dialogue going. There are strict criteria on who can enter the dialogue; there are criteria on what the dialogue should be about. And there are criteria that determine how a dialogue should be concluded (voting).

The FLA has to have certain flexibility to demands from outside the arena. The monitors are independent and, as a result, will bring their own dynamic to the process. There is a system for third party complaints, whereby the FLA has to respond to allegations of non-compliance by others than those already in the arena. This system could be seen as an independent controlling mechanism.

In April 2000, the FLA released a document containing the benchmarks and guidelines. A year later, the organisation approved of seven companies to participate in its program and it accredited three NGOs to be "independent external monitors".[26] Nike, for example, was one of the companies accredited to the compliance program. Nike's compliance staff, originally focusing on its own Code of Conduct, doubled between august 2001 and august 2002 to 64 members. The Vice President of Compliance was supported at Nike headquarters by a 10 person staff, with other compliance officers operating from regional offices around the world.[27]

The rules reflect a dialogue between business demands and broader concerns. Businesses are particularly vulnerable when information of their production methods reaches the streets. Their competitors are listening as well. So the FLA contains certain safeguards that information will not be put out on the street easily. On the other hand the needs of the consumer public to know whether a company is acting according to FLA principles have been addressed by giving companies a relatively short period, 90 days, to remedy any wrongdoings. After that their behaviour will be judged and communicated to the outside world.

In conclusion, the arena is very accessible to parties that directly have a stake at play in the working conditions in the apparel industry, and are willing to engage in a dialogue and actions over those issue, as well as third parties coming from outside the FLA network that want to raise an issue or make a specific point.

6.5 Legitimacy of the Process

The core dimension of legitimacy in this study consists of input legitimacy and process legitimacy. Both elements of this dimension will be discussed in the next two sections.

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[26] Connor 2001, p. 29.
[27] FLA 2003, p. 47.

6.5.1 Input Legitimacy

All the reports and other information provided to the FLA by the Participating Companies and accredited independent external monitors are accessed by the FLA staff. Based on the confidential assessment of the staff the Executive Directors of the Association shall advise the Board of Directors whether the production of Applicable Brands of a Participating Company shall be certified and what measures a company should take the following year in order to stay certified. The Director and the Board evaluate on the following factors:

- effective implementation by the Participating Company of an internal compliance program and independent external monitoring system consistent with the Monitoring Principles;
- timely remediation by the Participating Company of instances of non-compliance with the Workplace Code or Monitoring Principles found by internal or accredited independent external monitors; and,
- in situations where monitors have found a significant and/or persistent pattern of non-compliance, or instances of serious non-compliance, with the Workplace Code or Monitoring Principles, the taking of adequate steps by the Participating Company to prevent recurrence in other Applicable Facilities where such type of non-compliance may occur.[28]

The decisions of the Board of Directors are the results of a voting procedure laid out in the Charter:

- The decision whether to certify initially that the Applicable Brands of a Participating Company are produced in Compliance with the Fair Labor Association Standards, based on reports of the Association's accredited independent external monitors, and the approval of the initial Association Public Report regarding such Participating Company: Simple Majority Vote;
- The decision whether to renew, for an additional one-year period, the certification of a Participating Company's Applicable Brands and the approval of the annual Association Public Report regarding such Participating Company: Simple Majority Vote.[29]

The rules on decision-making are very clear. There are rules with regard to the motivation of the decision, and there are rules on the way the voting by the Board should be taking place.

If a company is found to be in non-compliance with the FLA standards, then it will be placed on a special review by the Board of Directors for a period of 90 days. During this special review period no communications will be made externally - to the public - that a company is in compliance with the FLA standards. This period of review can be extended in order to allow a Company to remedy its activities to

[28] Charter Document FLA, p. 25.
[29] Charter Document FLA, p. 8-9.

be in compliance. During this period the company keeps its status as a Participating Company.[30]

The Board of Directors may decide at the end of a special review period that a company has not effectively addressed the issues that required the period of review. It then may decide to terminate the participation of that Participating Company.[31]

> In the event that the status of a Participating Company is placed on a special review, the decision whether such a Company shall have its participation in the Association terminated following the special review period: Supermajority vote.[32]

A "supermajority" vote requires the approval of at least two-thirds of all the industry members of the board and at least two-thirds of all Labor/NGO members of the board, with the chair having no vote on the matter.[33] The fact that a company's participation has been terminated will be made public by the FLA.[34]

The FLA has also a third party compliant procedure that allows any person or organization to initiate a complaint to a multinational or university / college. Such a third party should report 'any significant and/or persistent pattern of non-compliance, or individual incident of serious non-compliance, with the Workplace Code or Monitoring Principles with respect to any Facility of a Participating Company or any Facility or College or University Licensee that is subject to the FLA Monitoring Process.[35]

6.5.2 Process Legitimacy

The Fair Labor Association is an instrument developed to combine the efforts of industry, NGOs, colleges and universities to promote adherence to international labour standards and improve working conditions world wide.

Multinationals can choose either to adopt their own code of conduct, or to adopt the Work Place Code that has been developed by the Apparel Industry Partnership's Agreement of 1997. The principles of monitoring contain obligations of companies and of the independent external monitors. The obligations of companies are covered by the Apparel Industry Partnership's Agreement, and can be summarized as follows:

(i) establish clear standards;
(ii) create an informed workplace;
(iii) develop an information database;

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30 Charter Document FLA, p. 26.
31 Charter Document FLA, p. 26.
32 Charter Document FLA, p. 9.
33 Charter Document FLA, p. 4.
34 Charter Document FLA, p. 26.
35 Charter Document FLA, p. 27-28.

(iv) establish a program to train company monitors;
(v) conduct periodic visits or audits;
(vi) provide employees with opportunity to report non-compliance;
(vii) establish relationships with Labor, Human Rights, Religious or Other local Institutions;
(viii) establish means of remediation.[36]

The independent monitors will have to demonstrate satisfaction of the independence criteria of the FLA. The five obligations for independent monitors are:

(i) Maintain standards of independence,
(ii) Conduct independent external monitoring in accordance with FLA Methodology and procedures,
(iii) Evaluate compliance with the FLA workplace Code of Conduct,
(iv) Report findings of non-compliance in a Timely fashion,
(v) Maintain accountability for the findings.[37]

The FLA's functioning depends on providing adequate and trustworthy information on the adherence to international labour standards by multinationals and improve working conditions world wide to the general public. Therefore it is not surprising that the Charter Document contains rules on communications to the public. Companies can only announce that they are participating in the FLA after the Board of Directors has approved of this. Claims by companies on adherence to the FLA standards are even more strongly regulated:

> A Participating Company cannot make any public announcement or other communication to the public that all or some of its Brands are produced in compliance with the Fair Labor Association Standards and shall not have the right to use the service mark of the Association unless:
> a) such Brands have been certified by the Association to be produced in compliance with the Fair Labor Association Standards; and,
> b) the Company continues to satisfy the criteria set above for participation in the Association.[38]

Compliance is not a 'one off' show, but should be a continuing commitment. Only after both these requirements have been met; 'certified compliance' and 'continuing commitment', then a company may communicate with the general public on this issue and use a service mark in product labelling, advertising and other communications.

The Fair Labor Association is aware that disclosing information on companies can be tricky, either because of market competition or for legal reasons. Therefore a further set of rules was created:

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36 Charter Document FLA, p. B-1 and B-2.
37 Charter Document FLA, p. B-4.
38 Charter Document FLA, p. 14.

> Neither the Board of Directors nor any member of the Association' staff shall disclose to the public any information relating to any Participating Company which is confidential or proprietary, including detailed information or assessment regarding
> i) the overall status of such Participating Company in the Association; or,
> ii) the status of a particular unresolved Complaint relating to a Participating Company, if, in either case, any such information has not already been disclosed to the Public or by the Association.[39]

However, information with regard to the certification of applicable brands shall be published:

> ... the status of such Participating Company in the Association, as well as the identification of the Applicable Brands for which it is seeking certification and whether such certification has been obtained shall be publicized by the Association and the Association shall issue public reports with respect to each Participating Company ...[40]

In the previous sections it was argued that it was precisely the execution of this rule, through its first report in 2003, which gave the FLA and the companies' credibility in the eyes of the public.

Finally, the Charter Document contains a whole range on rules with regard to the auditing and monitoring process itself that regulate all the communications between the FLA, the companies and the independent auditors. These rules contain specifications for the uniformity of the reports, time schedules and content requirements.[41]

6.6 Effectiveness of the Outcome

The Fair Labor Association was specifically designed to enforce compliance of multinationals with fair labour standards. What does 'compliance' mean in this network? According to the Charter document compliance means:

> (i) effective implementation by a Participating Company of an internal compliance program and independent external monitoring consistent with the Monitoring Principles;
> (ii) timely remediation by the Participating Company of non-compliance with the Work Place Code or Monitoring Principles found by internal or accredited independent external monitors; and,
> (iii) in situations where monitors have found a significant and/or significant persistent pattern of compliance, or instances of serious non-compliance, with the Work Place Code or Monitoring Principles, the taking of adequate

39 Charter Document FLA, p. 14.
40 Charter Document FLA, p. 14.
41 Charter Document FLA, p. 19-25.

> steps by the Participating Company to prevent recurrence in other Applicable Facilities, where such type of non-compliance may occur.[42]

In the early stages, the actors were accountable to the President of the United States through their involvement with the Presidential task force, and to the consumers, who where angry over corporate policies involving child labour and sweatshops. The FLA mechanism holds a very detailed system of corporate accountability to FLA commitments. But not only corporations are being held accountable; the independent monitors are being held accountable for their findings as well. By ensuring that controllers and controlled are being held accountable individually, it can be said that the FLA represents a breakthrough in corporate accountability to the public.

On June 4th, 2003, the Fair Labor Association made the findings from independent audits of seven major footwear and apparel companies public.[43] This public report provided information on the compliance programs that had been put in place by the multinationals in their first year of full participation in the FLA. In total, 185 audits were carried out by accredited monitors. In 48 cases instances of non-compliance were found. The report was unique, according to FLA executive Director Van Heerden:

> This marks a breakthrough in corporate accountability to the public. Working together, companies and critics have taken a big step beyond talking about social responsibility and are starting to get the facts into public view.
> ...
> This means that members of the public will be able to see for themselves exactly what is being found in each factory and what is being done about it.[44]

The first results showed that all companies had room for improvement. This was not always easy according to the report, as the Nike case illustrates:

> While the company reported that this approach was far more time and resource intensive than an approach which focussed on "quick fixes", Nike considered such close mentoring to be beneficial in the long-term. With regard to transparency, Nike endeavoured to issue public reports on its supply chain in a systematic manner. The company published its collegiate producing facilities, and also started to publish the findings of independent monitoring visits. While this program stalled, due to legal complications, Nike reported its continued dedication to transparency in order to foster a balanced understanding of realities on the factory floor.[45]

Michael Posner, speaking as an FLA Board Member on behalf of the Lawyers Committee for Human Rights, said:

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42 Charter Document FLA, p. 3.
43 The companies included were: Adidas-Salomon, Eddie Bauer, Levi-Strauss & Co, Liz Claiborne Inc., Nike Inc., Philips van Heusen and Reebok International Ltd.
44 FLA, June 4th, 2003.
45 FLA 2003, p. 48.

> The companies deserve a lot of credit for trusting the public with the grit as well as the gloss, on an issue that will take persistence and struggle for many years to come.[46]

In an interview with Business Week, Posner added:

> When you put these reports in the public domain, it creates a huge incentive for companies to remedy the problems...It's like the old Reagan line: Trust, but verify.[47]

Magazines, like Business Week and the Financial Times, were positive about this initiative, as can be illustrated by an article by Maitland in the Financial Times:

> Imagine being suspended for five days because you are too ill to get to work. Or having 30 percent of your day's pay deducted for arriving 32 minutes late. Or being persistently insulted and humiliated by your supervisor.
>
> These were three of as string of labour, health and safety violations uncovered at a factory in the Philippines making clothes for Levi Strauss. The abuses make shocking reading. But what is remarkable is that they have been documented and made public on the internet with the active cooperation of the US jeans manufacturer.[48]

This first report went down well with the public and the multinationals involved. Even after damaging findings, participating companies like Adidas reported that:

> This is a precedent-setting report establishing the FLA's leadership role in verifying factory workplace conditions. The report illustrates that monitoring, remediation and transparent communication are integral elements of the FLA methodology. This first FLA annual report gives a clearer understanding of the issues, challenges, and trends that brands face when working with contracted supply chains.
>
> Adidas-Salomon is committed to continuously improve working conditions throughout its supply chain, including standards for employment, health and safety and workers rights.[49]

However, even the director of the Fair Labor Association, Van Heerden, seems to be convinced that the best way to protect worker's rights in developing countries is for the governments to write good legislation and enforce it:

> In many ways we are a stopgap response to the lack of enforcement.[50]

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46 FLA, June 4th 2003.
47 Bernstein, June 23, 2003.
48 Maitland, June 10, 2003.
49 Adidas, June 12th, 2003.
50 Ford, June 13th, 2003.

Although the US government was involved with the initiative, it no longer plays a role in the issue of accountability. The rules of accountability itself are vague in so far as that it is unclear whether they are referring to domestic or International Law, or that they are law at all. The mission statement says that the FLA combines efforts to "promote adherence to International Law" but then fails to identify what – if any – International Law, treaties, and conventions this relates to.

The workings of the FLA are clear and can be followed by any one who is interested. Its operations, its procedures have all been made public and can be accessed through its website. The companies have to be transparent to the independent external monitors, which, in their turn, have to be transparent as well. It is only in the editing of the information that some of this transparency is lost in order to protect companies from loosing vital business opportunities. However, if a company is not responding adequately to allegations and does not try to make a real change, than the whole nature of their failure to meet FLA standards will be made transparent.

The FLA reports annually on the progress that its participating members have made. The first of these reports was published in June 2003 and gained a lot of media attention because all the details on violations were there in black and white. It can be assumed that this "in your face" approach ensures a high level of credibility with the general public. The articles in the business' and other magazines seem to indicate this reaction.

6.7 Analysis

The events that led to the creation of the FLA started with a limited number of actors. These actors began to interact with each other in the wake of media revelations about working conditions in sweatshops in California. Through the intervention of the American President, who created a special task force, this grew into an American association with a global impact. In this specific case it seems that existing International Law practices with regard to the working conditions in manufacturing, such as protected by the ILO-conventions, were not (automatically) considered to provide adequate foundations upon which this new mechanism of global governance in the context of accelerating globalisation was to be build.

First, we will look the significant stakeholders in this case. In the processes leading up to the creation of the FLA, various actors became involved at different stages. First, there were the policy announcements and roundtable meetings by the Clinton administration shortly after assuming office in 1993. But it took a concrete scandal in California, brought to light by the media, to raise public awareness and public protest. These spontaneous protesting and self-organising groups became very powerful. They demonstrated a serious capacity to organise consumer boycotts, to create headlines, and to cause considerable financial damage to the apparel industry. These initiatives, in turn, gave the American administration the political leverage, over and against a Republican Congress, to organise a presidential task force, which brought together representatives from

corporations and NGOs. This task-force led to the creation of a new independent actor: the FLA.

Secondly, in this case the capacities of the actors to influence the creation, implementation and subsequent functioning of the FLA changed significantly. Non-state capacities in a global governance network with regard to the working conditions in the apparel industries around the world were developed without significantly affecting state capacities. There are three factors that might help to explain this development. First, the US government actively encouraged the creation of the FLA, by giving it a Presidential seal of approval. But no concrete laws were passed in Congress, partially because the Democratic Administration could not convince a Republican dominated legislature, so, at least theoretically, all official options for introducing future legislation remained open. Secondly, although making a vague reference to International Law, this never materialised into concrete commitments to existing international standards. The result being that ILO-conventions and the resulting state-obligations could not be invoked as being part of the FLA, leaving the US government's responsibilities out of the equation. Finally, the FLA is based on the voluntary participation of the actors, so technically no actor could be forced by any legal means to co-operate. The only reason that keeps the FLA together is the risk of public exposure of the multinationals. Any signal that a multinational intends to pull out of the FLA could give rise to the idea that they might not be caring about labour conditions at all, which in turn could result into another financially damaging round of global consumer actions.

Thirdly, the accessibility to the political arena in which the FLA has been created was based on the notion of dialogue between representatives of NGOs and Multinationals brokered by the office of the President. The idea of dialogue has been institutionalised in the FLA-charter, albeit with safeguards to protect "eavesdropping" of abstaining competitors of the companies participating in the FLA. The accessibility of the wider public to the information about reports has been safeguarded as well. Participating companies get the reports first, and a 90 day period to make amendments. After that period, the information will be released in the public domain. This gives multinationals time to make amendments, but keeps them under pressure to do so, or face consumer condemnation, and thus loss of trade. Finally, third parties have access to the arena through an independent third party complaint procedure. In conclusion the accessibility of the arena depends for stakeholders is straight forward and comes with safeguards to protect vital business interests. The accessibility for third-parties has been regulated through a special complaint procedure.

Fourthly, the legitimacy of the FLA depends to a large extend on the public perception of transparency. The rules of decision-making are clear and accessible. Furthermore, the FLA produces year reports and maintains a website. On the other hand, specific confidential information with regard to vital business interests or a particular unresolved complaint will not be made available. However, to ensure the quality of information (and thus of transparency) independent audits will be organised and reported.

Fifth, the effectiveness of the FLA. Although not being rooted in International Law or theories, the FLA started out on a good footing with (international) consumers. The public seemed impressed by the fact that, for the first time, the details of violations by participants of the FLA code were made available in black and white. This 'in your face' policy helped to convince sceptics and forced multinationals to change policies with regard to working conditions in the apparel industries. Although not a perfect mechanism of global governance, it seems to function as 'a stopgap response to the lack of enforcement' in developing countries. Apparently, in the words of the director of the FLA, existing international legal frameworks had not inspired developing countries to provide adequate legislation and enforce it.

6.8 Conclusion

This second case-study looked into the circumstances that led to the creation of a new arrangement regulating International Relations with regard to labour conditions during the production of clothes and shoes. In this case, no direct relationship could be established between the traditional body of International Law, such as international ILO standards, and the FLA. While there have been only vague references to 'International Law', the FLA is firmly based upon, and rooted in, American legal standards.

Building on, and enabled by, American law and the size and importance of the American consumer market, the capacity of the FLA to influence working conditions has been felt in over more than 80 countries around the world. The growing dependence of national producers on global consumer markets –and, as the largest and most trend setting, the American consumer-market- have made American legal norms and consumer attitudes de-facto international regulatory standards. Any multinational hoping to operate on the American consumer market, or any local company hoping to produce for the American consumer market, will have to comply with FLA standards. In this case, a complex coalition of concerned constituencies was able, through the use of modern information and communications technologies, to organise consumer boycotts and national political pressure on American multinationals to change their behaviour or the behaviour of their subcontractors, even when their actions were taking place well outside American territories and under different national laws.

Although there exists a vast network of international regulatory arrangements in International Law with regard to labour rights and labour conditions, this network apparently seems to have been insufficiently adapted to ensure the enforcement of these standards in developing countries. Or, in the words of FLA officials, these international regulatory arrangements based upon International Law had failed to 'inspire nations to provide adequate legislation and protection measures'. Through the FLA, American standards are now being 'exported' by a coalition of social responsible multinationals, human right NGOs and concerned consumers organisation as a stop-gap measure to protect the exploitation of workers.

The effect of this 'export' of American legal norms and consumer concerns has been that there was a direct and measurable impact with regard to working condi-

tions in developing nations. Thereby, the FLA is achieving a goal that the existing body of International Law apparently, at least partially, had failed to achieve. Furthermore, the FLA has created a working auditing mechanism that involves stake-holding NGOs and stake-holding multinationals. In its first year it carried out 185 audits. In 48 cases misdemeanours were reported and amended under close consumer scrutiny.

In conclusion, we have seen how in this case the particular capacity of states to create and enforce international regulatory networks with regard to labour conditions has become largely dislodged from state-institutions and/or international regulatory networks, and has been transferred to a new coalition of non-state actors. This new coalition has developed international regulatory capacities that influence actual consumer and producer behaviour well beyond the territorial borders of the country were the FLA originally was created.

7. The Global Compact

7.1 Introduction

In 1977, the United Nations started a program to develop a code of conduct for transnational corporations.[1] From that moment, the issue of corporate responsibilities with regard to human rights regularly returned on the UN agenda. However, some states were against the idea that the UN should become involved with the issue of corporate social responsibility. By 1992, political pressure by the US government practically forced the UN decide that the project on corporate responsibility would be transferred from the UN headquarters in New York to the UNCTAD in Geneva. Soon afterwards, the project was transformed into an advisory body on corporate investment.[2] This did not herald the end of the UN's efforts to develop some sort of regulatory code for multinationals. In 1999 a new initiative was launched: the Global Compact. In this chapter the relationship between the Global Compact and the traditional body of International Law with regard to the protection of labour-rights, human rights and the environment will be explored.

In 1999, the UN Secretary-General presented the Global Compact, a new initiative engaging multinationals to work directly with the United Nations, in partnership with labour organisations and other non-governmental organizations in an effort to identify, disseminate and promote 'good' corporate practices with regard to nine principles that are based on the Universal Declaration of Human Rights, the International Labour's Declaration on the Fundamental Principles and Rights at Work, and the Rio Declaration on Environment and Development. These principles are:

- To support and respect the protection of internationally proclaimed human rights;
- To avoid complicity in human rights abuses;
- To uphold freedom of association and the effective recognition of the right to collective bargaining;
- To eliminate all forms of forced and compulsory labour;
- To abolish effectively child labour;
- To eliminate discrimination with respect to employment and occupation;
- To support a precautionary approach to environmental challenges;
- To promote greater environmental responsibility, and
- To encourage the development and diffusion of environmental friendly technologies.

The Global Compact began as a practical answer to a practical problem: how can global corporate responsibility with regard to human rights, labour rights, and the

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1 Malanczuk 1997.
2 Yearbook of International Environmental Law 1994.

environment, be achieved when there is no chance of reaching an internationally binding agreement between nation states? In this specific case it seems that principles agreed upon by states, have become the foundations of a new initiative that could be seen as an expansion of the work of the UN - beyond working with states - to including multinationals and NGOs in a new mechanism of global governance.

The official mission of the Global Compact seeks to contribute to more sustainable and inclusive global markets by embedding them in shared values:

> It hopes to foster a more beneficial relationship between business and societies, paying particular attention to the world's poorest people. Accordingly, the Compact pursues two complementary goals. The first involves efforts to internalise the Compact and its principles by making them part of business strategy and operations. The second is to facilitate cooperation and collective problem solving between different stakeholders. Four key engagement mechanisms are used to accomplish these goals: Dialogue, Learning, Local Networks and Project Partnerships.[3]

Although the content of the Global Compact was inspired by principles of International Law, the institutional legal foundations of the new organisation have remained a bit unclear. It was only well after its creation, that the UN General Assembly recognised the importance of this initiative and voiced it's support. So content-wise the compact contains rules that belong to the body of International Law, but institutionally-wise the compact looks more like a informal policy network.

Despite these mixed foundations, Kell and Ruggie have expressed their belief that the compact could become an important instrument at the global rule making level, which aims at closing a perceived governance gap between the social sphere and the corporate sphere.[4] In an important Global Compact publication this was formulated as follows:

> The Global Compact is a voluntary corporate citizenship initiative. As such the Global Compact is not a regulatory instrument – it does not 'police' or enforce the behaviour or actions of companies. Rather the Global Compact relies on the enlightened self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based.[5]

Ultimately the Global Compact aims to accomplish two goals. The first goal is to enlist the corporate sector to help close the gap between the strictly economic sphere and the broader social agendas that exist at the global level today. Or again, in the words of the Guide:

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3 UN/GCC January 2003.
4 Kell and Ruggie 1999, p. 111.
5 Guide 2003, p. 4.

> The Global Compact seeks to provide a contextual framework to encourage innovation, creative solutions, and good practices among participants. The Global Compact is not a substitute for regulatory structures or other codes. Indeed, the Global Compact believes that voluntary initiatives and regulatory systems complement each other and, when combined, provide powerful impetus in encouraging the wide adoption of responsible corporate citizenship.[6]

The second goal, according to Kell and Ruggie, is that the United Nations seeks to establish a substantial level of corporate backing for a more robust UN role in human rights, environment and labour standards, thereby responding to a growing imbalance in global governance structures.[7] This second goal might have come in response to financial problems and criticism from US politicians to the organisation.

The next section will start with introducing the actors in the various networks that make up the Global Compact mechanisms. Section 3 will describe the development of the Global Compact mechanism in several stages. This enables us to see the strengths and weaknesses of the various actors during the creation-phase, and the initial implementation phases. Section 4 explores the accessibility of the Global Compact network. Sections 5 and 6 will zoom in on the legitimacy and effectiveness of this emerging global governance regime. The final sections (7 and 8) will discuss the findings and draw conclusions with regard to the relationship between this new regulatory arrangement and the existing body of International Law.

7.2 The Position of the Actors

The Global Compact is made up of four components: a learning forum, a policy dialogue, a partnership project and local structures.[8] The Learning Forum is a platform that motivates companies into taking action through implementing the GC principles. As such it will form a knowledge base to learn how companies can and are implementing the universal principles. The Learning Forum reinforces the Policy Dialogues. This second component encourages action networks between labour and civil society organisations in order to exchange views and substantive discourse on the contemporary challenges of globalization. Within these networks, innovative solutions to complex problems could be developed. More specific actions are undertaken in the Partnership Projects in which various initiatives are taken like a project on discrimination at the work floor with the UN and six companies. Finally, there are the Local Structures that are meant to build links between grassroots and global activities, facilitating the establishment of country and regional networks working on Global Compact issues.[9]

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6 Guide 2003, p. 4.
7 Kell and Ruggie 1999, p. 105.
8 Guide 2003, p. 11.
9 Guide 2003, p. 11.

We can distinguish at least six categories of actors. In principle, States are not directly part of the Compact, but they do provide the essential legitimacy and universality to the principles of the Compact.[10] The United Nations organisation itself provides the practical platform for the existence of compact. The other four categories of actors are: business, labour, civil society organizations, and other actors like academic networks. For each of these four categories it will be investigated which rules and facts have determined their representation in the Global Compact Network.

There are four criteria that determine whether a company (national or multinational) can participate in the Global Compact. To participate in the Global Compact, a company:

- Sends a letter from the Chief Executive Officer (and, where possible, endorsed by the board) to the Secretary-General Kofi Annan expressing support for the Global Compact and its principles;
- Sets in motions changes to business operations so that the Global Compact and its principles become part of strategy, culture and day-to-day operations;
- Is expected to publicly advocate the Global Compact and its principles via communications vehicles such as press releases, speeches etc.; and
- Is expected to publish in its annual report (or similar corporate report) a description of the ways in which it is supporting the Global Compact and its nine principles.[11]

In the early days of the Compact initiative, some NGOs were worried over the fact that the UN 'boasted' many companies to be part of the Compact, while only around forty appeared on the Website. According to UN officials, this was due to the fact that companies had to fulfil all the requirements of the Compact before they became accepted partners and thus legible for mentioning on the Global Compact website.[12]

The second category of organizations that are part of the Global Compact contains organised Labour. Specific parts of the nine principles that guide the Compact are specifically aimed at labour conditions. The Compact recognises labour organisations as a part of both industry and society. Because of this distinct position in relation to both business and civil society, they has been given a separate position within the network.. Or, in the words of the office of the Global Compact:

> The structures of the international trade union movement equip it to coherently participate in the Compact in a way that covers sector and sectoral engagement as well as general policy issues. Trade unions are representative organisations that bring to the table long traditions of internal democracy, transparency, and accountability to members.[13]

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[10] UN/GCC 2003, p. 2.
[11] Guide 2003, p. 7.
[12] UN 12.02.2002.
[13] Handout 2003, p. 3.

With regard to NGOs and the Global Compact, a further distinction should be made between those like Amnesty International that are part of the network (and are called Project partners), and others, like Corpwatch, who are not part of the network but are still taken seriously by the compact members. The rules on NGO participation seem to be less formal, less strict, and more functional:

- A NGO should be willing to engage with all actors;
- A NGO should have the proven ability to make a substantive contribution to the network;
- A NGO should have the ability to transcend a single-issue orientation;
- The NGO should provide proof of a minimum level of transparency and accountability in matters like membership and funding.[14]

The demands for NGOs seem to have a highly functional character. Their participation is only welcome when they in fact can contribute to the project. But as a result, one can estimate that the valuation of NGO compliance with these rules can entail a succinct arbitrary dimension. A statement of a multinational representative helps to illustrate this:

> We will probably select a number of NGOs to obtain their views on the Global Compact and perhaps create partnerships which, among other things, will give them more insights into our operations.[15]

From this statement, one can deduce a further requirement for NGOs: they must be acceptable for the multinationals. And even then, real partnerships are 'optional'. This should come as no surprise given the origins of the initiative. Most relationships between multinationals and NGOs are strained.[16] As the bonds between multinationals and the UN were tightened, the NGOs were kept largely at bay.

Finally, there is a category of 'other actors', which is comprised of 'relevant' institutions that might facilitate the efforts at internalising the Compact's principles. This category includes academic and think tank organisations.[17] It is not exactly clear what determines their participation, but it is not unlikely that the NGO guidelines were followed.

7.3 The Capacities of the Actors

From 22 to 24 January 1997, then recently appointed, UN Secretary-General Kofi Annan visited Washington, D.C. The first priority of the new Secretary-General after arrival was to meet with the Republican leaders of the US Congress, who had been very critical of the UN and had stopped US payments to the organization. Annan met with Congressman Benjamin Gilman (Republican –New York), who

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[14] Handout 2003, p. 4.
[15] Representative Urs Baerlocher of Novartis quoted in the International Herald Tribune: IHT 25.01.2001.
[16] See Josselin 2001.
[17] Handout 2003, p. 4.

issued a clear warning that the UN should take the US Congress seriously. The press release on the occasion of this meeting states:

> ...Congressman Gilman stated that the United States Congress was happy that the Secretary-General had eliminated a layer of bureaucracy; the Congress was trying to work out a formula for paying United States arrears, conditional on reform.
>
> ...Congressman Gilman expressed concern over the suggestion that the United Nations impose a global tax, and mentioned the possibility of the United States reducing its contributions to both regular and peace-keeping budgets.[18]

Two days later, in a lecture to the National Press Club, the UN Secretary-General explained how he was cutting costs and streamlining the organisation according to the demands of its US critics. He also expressed that, in meeting the challenges of globalization, there was a need for partnerships:

> ...meeting these challenges requires trust, partnership and commitment from us all: national governments, parliamentarians, regional and international organizations, non-governmental organizations, the media, the public – in short, from all who make up the United Nations.[19]

The next week, the UN Secretary-General, for the first time in history, attended the World Economic Forum (WEF) meeting in Davos, Switzerland. At this meeting Annan gave a speech in which he broadened the scope of his partnership policies, as expressed in Washington, D.C., a week earlier, to include the private sector:

> ...Strengthening the partnership between the United Nations and the private sector will be one of the priorities of my term as Secretary-General. Without greater cooperation, the social and economic needs of the developing world cannot be met.
>
> ...We can only do this and create an effective organization you can be proud to do business with, by urgently addressing the United Nation's ongoing financial crisis.
>
> ...For both the United Nations system and the private sector, our goal for the twenty-first century is nothing less than creating a true global economy, genuinely open to all of the world's peoples.
>
> ...As Secretary-General, I am committed to doing just that. I am open to your advice and I look forward to hearing from you.[20]

The reaction of the World Economic Forum did not take long. In March/April 1997 the Secretary-General was linked with the WEF's video conferencing sys-

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[18] SG/T/2081.
[19] SG/SM/6149.
[20] SG/SM/6153.

tem.[21] According to Ellen Paine of the Global Policy Forum (a New York-based NGO), this was a direct result of Annan's speech in Davos.[22] The new technology connected the UN directly with the most important actors in the WEF, without any interference (knowledge) by national government representatives or the general public.

However, governments were not out of the picture. In June 1997, a roundtable on "cooperation between governments, private sector and the UN meeting Sustainable Development objectives" was organised by the President of the UN General Assembly and the director of the WBCSD (World Business Council for Sustainable Development). In total, thirty-seven participants were invited:

> ...The players in the meeting were 15 high level representatives of government, including three heads of state, the Secretary-General of the UN, the Administrator of the UNDP, and the UN Under Secretary-General responsible for presiding over the UN commission on Sustainable Development, the Secretary-General of the International Chamber of Commerce, 10 CEOs of transnational corporations. The CEOs were mostly members of the WBCSD, a council of transnational corporations (TNCs) originally organized...to represent the interests of global corporations at the United Nations Conference on Environment and Development in Rio in 1992.[23]

According to Korten (People-Centred Development Forum), who had been invited as one of the two academics to the meeting:

> ...The meeting's outcome was preordained. It closed with Ambassador Razali, President of the General Assembly, announcing that a framework for the involvement of the corporate sector in UN decision making would be worked out under the auspices of the Commission on Sustainable Development.[24]

This particular outcome was partially based on ideology and partly on the realities of globalisation:

> ...Underlying the words of everyone who was allowed to speak, with the sole exception of the NGO spokesperson..., was an embrace of the neo-liberal logic of market deregulation and economic globalization. According to the prevailing wisdom, economic globalization and the economic dominance of corporations are irreversible realities to which we must simply adapt. Since global corpora-

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21 Washington Times, March 5· 1997.

22 Soon after the Davos-speech, the leaders of the World Economic Forum offered to connect the Secretary-General and a few of his top officials to the Forum's new private video-conferencing system, enabling Annan and his team to converse with the Forum's CEO members as well as a few select political leaders and chiefs of international institutions like the World bank. While the new technology provided the cash-strapped UN with a state-of-the-art communications tool, the system worked primarily to connect the Secretary-General and other UN leaders with corporate executives, bypassing the intergovernmental process (Paine 2002).

23 Korten 1997.

24 Korten 1997.

> tions have the money and the power, any viable approach to dealing with poverty and the environment must center on providing market incentives...Thus it follows, by the twisted official logic, that corporations need to be brought in as partners in public decision process to assure that the resulting policies will be responsive to their needs.[25]

If the connections with business were meant to give the UN some financial space, then September 1997 should mark the first success of this strategy. Media billionaire Ted Turner announced on CNN, on September 18th, that he was making a $ 1 billion contribution to the UN, spread out over ten years.

The new UN-business partnership was officially proposed in a speech of the Secretary-General at the WEF meeting of January 31st 1999. In this speech the Secretary-General proposed that business leaders and the United Nations would initiate a global compact of shared values and principles, in order to give a human face to the global market:

> ...Today, I am pleased to acknowledge that, in the past two years, our relationship has taken great strides. We have shown through cooperative ventures – both at the policy level and on the ground – that the goals of the United Nations and those of business can, indeed, be mutually supportive.
>
> ...I want to challenge you to join me in taking our relationship to still a higher level. I propose that you, the business leaders gathered in Davos, and we, the United Nations, initiate a global compact of shared values and principles, which will give a human face to the global market.
>
> ...[multinational] power brings with it great opportunities – and great responsibilities. You can uphold human rights and decent labor and environmental standards, directly, by your own conduct of your own business.
>
> ...Don't wait for every country to introduce laws protecting freedom...You can at least make sure that your own employees, and those of your subcontractors enjoy those rights.
>
> ...you can encourage the development and diffusion of environmentally friendly technologies.[26]

The Secretary-General proposes a world-wide network (hence: global) to implement human right, labour and environmental standards through a voluntary agreement (hence: compact). The content of this voluntary network was based on an idea of 'shared' values and not 'traditional' rules of International Law.

On June 26, 2000 the Global Compact was officially launched at the UN headquarters in New York. That morning an article appeared in the International Her-

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[25] Korten 1997.
[26] SG/SM/6881/Rev. 1.1. February 1999.

ald Tribune in which the Secretary-General explained why he was creating "a new coalition for universal values":

> ...The essence of the Compact is that, to help make markets sustainable at the global level, enlightened corporate leaders of the new world economy will act on these principles [the 9 principles see below] in their own corporate management practices.
>
> At today's meeting, the corporate leaders who are prepared to take this step will be joined by heads of international labor and civil society organizations active in the fields of human rights, economic and social development, and protecting the global environment.
>
> ...Some may sat that business should stick to business, and leave wider concerns to government. Certainly it is true that neither corporations nor voluntary groups can replace the indispensable role of the state. But we cannot wait for governments to do it all. Globalization operates on Internet time.[27]

Present were chief executives and managers of 50 multinationals. Missing from this meeting were state representatives.[28] Only a handful of NGOs had been invited:

> The Secretary-General also had invited a small number of sympathetic NGOs, including Amnesty International, the Worldwide Fund for Nature and the International Confederation of Free Trade Unions. But these NGO 'partners' were clearly uneasy at the spectacle. Amnesty International Director Pierre Sané said bluntly that he didn't think the Compact was credible in the absence of formal rules. By contrast, the corporate participants made it clear that they wanted no rules – and not even the mildest of monitoring.[29]

Many NGOs opposed the idea of partnerships between the United Nations and Multinationals. Organisations like Human Rights Watch reacted immediately to the new initiative in a letter that is typical of the NGO criticism of the Global Compact:

> ...Human Rights Watch believes that the Global Compact represents a positive but limited first step. It could encourage corporations to act responsibly, but only if it is implemented effectively. In our view three obstacles threaten to impede the Compact's effectiveness: the lack of legally enforceable standards, the lack of monitoring and enforcement mechanism, and a lack of clarity about the meaning of the standards themselves.[30]

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27 Annan, 26/07/2000.
28 No evidence has been found as to whether these representatives had been invited or not.
29 Paine 2000.
30 Human Rights Watch 2000.

Other NGOs bonded together in the 'Coalition for a Corporate Free UN' and published critical reports on like *Tangled up in Blue* and *Greenwash +10*.[31]

An uncomfortable relationship?

In 1997, one of the top priorities of the new secretary-general was to forge new partnerships between the private sector and the United Nations. One of the (positive) side-effects of this effort seems to have been extra financial resources for the work of the UN.

On September 1997 media billionaire Ted Turner announced on CNN that he was making a $1 billion contribution to the UN, spread out over 10 years (www.cnn.com).

On February 11th 1999 the Bill and Melinda Gates Foundation donated $2.2 billion to the United Nations Population Fund (UNFPA). This donation marks the beginning of a long and intensive cooperation between the Gates Foundation and the UN (see: www.gatesfoundation.org).

In media reports about the launch of the Global Compact, CNN mentioned that multinationals were paying 'big money' to be able to say that they were supporting the missions of the United Nations. A report by The Guardian uncovered in 2000 that the UN Development program had received $ 50,000 each from 11 multinationals, including Nike, Rio Tinto, Shell and BP. This scheme had started after the launch of the Global Compact at the WEF in 1999, but was later suspended under public pressure (The Guardian, 31.08.2000).

From the start, NGOs like Corpwatch worried that through 'image transfer', the UN's positive image would be used to 'bluewash' stained corporate images in a positive way. In their reports Corpwatch explicitly linked the financial leverage power of the United States over the UN budget to the financial problems of the UN and the attempts of the UN to find alternative financial means through involvement with multinationals.(www.corpwatch.org).

The critical NGOs were not asked to, nor did they want to, join the Global Compact. These NGOs saw the Global Compact as a media event, or an advertising hype. This position can be illustrated by a comment for CNN television on that day by John Cavanagh:

> ...I think that these companies jumped at the opportunity because they realised that it makes them look good. They will say publicly in front of a global audience that they are for rights, but they also knew that there is no enforcement.[32]

[31] CorpWatch 2002-2.
[32] CNN 27.07.2000.

A year later the Global Compact reached the agenda of the General Assembly. The office of the secretary-general had produced a report on global partnerships that had been submitted to the General Assembly.[33] The debate was instigated by the request to speak on this issue by the observer of Switzerland.[34] The Swiss observer argued that the Global Compact had to respect a number of 'simple and effective' rules:

> First of all, it must fully safeguard the integrity and independence of the United Nations. Then it has to function with the greatest possible transparency. Finally, its partners have to contribute to the realization of the objectives of the Organization The establishment of guidelines for the partnerships between the United Nations and the private sector, which are to be revised regularly in response to developments in the global political and economic environment, is therefore indispensable.[35]

During that same debate, the European Union, supported by other European countries, announced its intention to introduce a draft resolution on the issue of global partnerships. The European Union was highly in favour of the Global Compact:

> ...the Global Compact is an excellent example of successful cooperation between the United Nations and the private sector. In particular, it establishes that corporations bear a social responsibility based on the fundamental values of the United Nations.[36]

The European Union was also quite clear on the nature of the Global Compact:

> The European Union believes it would be wrong to set too formal a framework and thus risk discouraging the most generous or innovative initiatives from the private sector. The United Nations system must be open-minded towards private-sector actors. For example, it is not desirable to make the accreditation process too strict. The procedure should remain flexible and open.[37]

After five weeks of negotiating between the countries that supported the concept a draft resolution was introduced to the General Assembly.[38] These negotiations had an informal character. All parties involved wanted to establish a consensus on this issue. The Compact was sponsored by Western countries, but also by many members of the Group of 77, a UN coalition of developing countries. In the introduction of the draft resolution they were specifically mentioned:

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33 A/56/323.
34 A/56/PV.37.
35 A/56/PV.37, p. 21.
36 A/56/PV.37, p. 10.
37 A/56/PV.37, p. 10.
38 A/56/323.

> ...[Mr de Ruyt, representative of Belgium speaking] I wish to thank in particular the Group of 77, for its unfailing support for consensus and for its positive contribution throughout the negotiating process.[39]

In the end a total of 59 countries sponsored the resolution,[40] which was adopted without a vote by the General Assembly. The resolution named the Global Compact as an example of multi-stakeholder initiatives that states could support. At the same time that states made clear that they were affirming in this resolution their central position in International Relations with regard to policy-making:

> Recalling the central role and responsibility of Governments in national and international policy making...[41]

Without imposing rigid partnership agreements, the resolution 'towards global partnerships' called for a common approach to partnerships based on the following principles:

> ...common purpose, transparency, bestowing no unfair advantages upon any partner of the United Nations family, mutual benefit and mutual respect, accountability, respect for the modalities of the United Nations, striving for balanced presentation of relevant partners from developed and developing countries and countries with economies in transition, and not compromising the independence and neutrality of the United Nations system in general and the agencies in particular.[42]

The resolution was adopted unanimously during the 84th plenary meeting on December 11th 2001.[43] The states had reclaimed, at least on paper, their primacy over the issue.

In the meantime, the compact attracted the attention of many multinationals and local companies around the world. Soon some serious problems with regard to transparency and effectiveness did occur as becomes clear from a policy note dated January 4th 2002. New frameworks of operating were introduced, with more academic support to ensure the transparency and effectiveness of the compact. Demands were set for companies on how to present examples of implementing the companies. Annual meetings were set to reflect on the strategy and the responses in wake of the growth of the initiative,[44] but with no clear results.

7.4 The Accessibility of the Arena

The Global Compact is an initiative which tries to fill a gap in International Relations between global concerns on the protection of human rights, labour rights

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39 A/56/PV.84, p. 13.
40 A/56/PV.84, p. 13.
41 A/RES/56/76.
42 A/RES/56/76.
43 A/56/PV.84, p. 13.
44 GC/04/01/2002.

and the environment and the role and responsibility of non-state actors, in this case multinationals. The Global Compact addresses the issue of corporate citizenship. The main difference between this and earlier approaches is that in this case the corporations have been involved in the deliberations from the beginning. This involvement was brought about by the initiatives undertaken by the ICC and the WBCSD towards the UN. Because of this active lobbying the multinationals could be sure that they would be heard. Even more so, through this active approach, the multinationals were able to set large parts of the UN agenda on corporate citizenship.

Non-institutionalised forms of dialogue between the MNCs and the UN were essential in the run up to the Global Compact. The Global Compact can be seen as a way of formalizing the forms of dialogue between the UN and MNCs. The rules of the Global Compact make it easy for the MNCs to enter the arena. MNCs do not have to change significantly in order to enter. The dialogue within the Global Compact is primarily a dialogue between peers.

On the other hand, NGOs could not rely on established procedures enabling them to function within the UN system, because they face quite different criteria to enter the compact's dialogue. This was brought about by the fact that the compact had been conceived of, and designed, outside the mainstream policy lines involving the General Assembly and other institutions to which the NGOs have access. UN official George Kell was very clear on how the compact should deal with critical NGOs:

> As for criticism from civil society organizations that are not participating in the Global Compact, we must learn to distinguish more clearly between actors and their motives. Many of them are genuinely concerned about the risks involved to the image of the UN. In turn, we genuinely appreciate their concern...there are a few activists who thrive on hostility and point scoring. We have to learn that they are not interested in dialogue or bridge building.[45]

Dialogue has become the criterion for the selection of NGOs. NGOs have to be willing to engage with all actors and they have to be able to transcend a single-issue orientation. The latter is particularly interesting because one wonders whether MNCs would accept the same demand if they were asked with the same clarity to transcend their particular single issue, i.e. making profits. Kell remarks also signify something else. He identifies the limits of the dialogue with NGOs. NGOs that are hostile to the GC do not fit in the idea of dialogue and bridge building. It seems that dialogue is only functional if the partners of the dialogue are acceptable to the participating multinationals, if they are willing to act like peers instead of acting as the 'the opposition'.

States have no direct role in the dialogue. State representatives were present at some stages of the GC, but in the end they do not have a position within the GC.

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45 Kell 2000.

Communications between states and the GC takes places through reports by the Secretary-General to the UN General Assembly.

7.5 Legitimacy of the Process

Following the empirical framework for observing change and continuity, presented in chapter 4, this section will explore the both the input legitimacy and the process legitimacy of the Global Compact.

7.5.1 Input Legitimacy

Multinationals can start their cooperation with the Global Compact by sending a letter to the Secretary-General of the United Nations. This letter had to be signed by the CEO of the company. There were not many additional demands on the content of the letter. A sample letter that was published on the website in 2002 showed the following minimal requirement:

> Dear Mr. Secretary-General,
>
> I am pleased to confirm that our company .....supports the Global Compact and its nine principles.
>
> We undertake to make a clear statement of this support and once a year share with the United Nations one example of an action taken or lessons learnt in implementing one or more principles.
>
> Yours truly,[46]

From this minimal requirement on the communications three demands can be extracted. First, the CEO of a multinational has to sign the letter. In many companies this means that the board of executives must approve of joining the compact. In the relations between the UN and multinationals only the CEO can legitimately represent a company. The second demand is that a multinational must make a clear statement of their support for the compact. This statement should state that the company supports the Global Compact as such and the nine principles. It entails that companies can not pick and choose from the principles. Finally, companies are required to communicate once a year with the UN on specific actions under taken. It was with regard to this issue that further rules on communications were developed.

In October 2001 a conference was organised in London of the Learning Forum of the Global Compact. Prior to this conference 30 case studies had been submitted (followed by 14 more at the conference). But according to a review, none of the case studies conformed to the initial guidelines set out by the Global Compact office. Some case studies did not even mention the principles of the compact.[47]

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[46] GC 04/02/2002.
[47] GC 04/01/2002.

That same month a guideline was developed on behalf of the Global Compact office by MIT Professor Locke. This guideline contained four rules on writing a proper case-study:

- Cases should focus on an important issue. This means that the case should address a problem central to the Global Compact.
- Cases should be justified. Companies should clearly explain at the beginning of the case why this particular case study was chosen.
- Cases should be substantiated with significant data/evidence. This evidence should not only show the changes, but also the causal link between the action taken and the positive outcome reported.
- Cases should be transparent. They should be based on dilemmas/problems companies experience when trying to tackle a difficult issue.[48]

Two months after the London meeting further decisions were made with regard to the communications. In order to simplify the procedure a two-pronged approach was adopted by the Global Compact office. This approach differentiated between 'examples' and 'case-studies'. Examples are 'short submissions adhering to a concise template focussed on the strictly factual elements of a company experience'. Companies are obliged to provide one example on an annual basis.[49] This example had to state the following information:

- Company name
- Company headquarters address and e-mail address
- Date submitted
- Author of submission
- Contact information of company representative
- Principles addressed in the example
- Involvement of other partners, i.e. NGOs
- Links to social impact, environmental, and/or annual reports
- Actions undertaken in support of the GC principles
- Outcome received on these actions[50]

Case studies – more detailed and analytical submissions developed on concert with the Global Compact office – would be solicited from companies capable and willing to craft more rigorous submissions along the MIT guidelines.

7.5.2 Process Legitimacy

The gap in International Relations was identified through the question: 'who is to be accountable for the violations by multinationals of human rights, labour rights and the protection of the environment?'. The legitimacy of the Global Compact process depends on the extend to which this instruments makes multinationals accountable with regard to the Compact's 9 principles. Multinationals see the free

48 Locke 2001.
49 GC 01/12/2001.
50 GC 04/01/2002.

market as the engine for the protection of human rights and the environment. Indeed, the dominant idea of the key-players in this arena is that progress in these areas will only come through economic development. Governments do not always succeed in this. They are even tempted to let others do encourage sustainable economic development:

> ...governments are divesting responsibilities, and there is a temptation to use the notion of corporate citizenship or social responsibility to justify this. But governments continue to hold they key for unlocking economic opportunities; leaders failing their own people continue to constitute the single biggest source of human misery. True, the compact is premised on the real world, where governance is imperfect. But this should not mean that we endorse or support that imperfect world, or lose sight of the ideal world, where governments live fully to their responsibilities. In such a perfect world, indeed, the role of business would simply be business, and the notion of corporate citizenship would be reduced to complying with laws.[51]

The idea is that governments are primarily accountable, but are not always taking their responsibility (the imperfect world). Therefore, others will have to act, though they do this because of lacking government action (the law). If governments had taken their responsibility, than this whole initiative would not have been necessary (corporate citizenship is: to comply with the law).

Much of the preparations towards the GC have been taking place behind closed doors. Yet, transparency is important in the functioning of the Compact according to its officials:

> [There] are divergent views about openness as a political and economic concept. Here, we do not have a choice. Too much is at stake. Our overriding priority must be the interests of developing countries and all others who depend on trade...multilateral cooperation, non-discrimination, reciprocity and transparency are our best defence. We cannot compromise on this understanding.[52]

Multinationals have felt that they cannot give too much openness because of the competitive nature of global business. Yet a specific format was created with demands on the content of case-studies, which even has the demand that cases should be 'transparent'.

The Global Compact website is the main instrument of transparency. One can find overviews of which actors are involved in the initiative, and one can access important documents and reports and see the official agenda of the meetings. However, it is a virtual transparency. The public and the media have no access to the actual meetings of the Global Compact. And in order to view examples, one needs a special code.

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[51] Kell 2000.
[52] Kell 2000.

Thus, accountability within the Global Compact is predominantly peer based. The multinationals had been in favour of this system all along. There also was no alternative because other forms like monitoring did not fall within the mandate of the Secretary-General.

Therefore, the Global Compact has been set up as a peer review system wherein multinationals subject cases to the UN, which are judged in the meetings of the UN and the multinationals. NGO advice may play a role but peer companies make the final judgements. It remains yet to be seen whether there will be enough peer pressure to change the behaviour of multinationals that have failed to reach the obligations of the Global Compact. The institution of an advisory council did not change this situation significantly.

The system of peer pressure and peer review might not be ideal from an outsider's perspective, but it is ideal to the multinationals themselves. When it became clear that governments could not agree on corporate responsibilities, many multinationals realised that if they did not take some of the responsibility in their own hands now, they would be overrun by – in their eyes – non-practical regulations afterwards. Kell's words illustrate this. He implies that corporations will obey the law, and that they would not mind to be held accountable with regard to how they obey the law. Yet, this issue is one that goes beyond obeying the law. It seems a logical objection of multinationals that if they are held accountable beyond the demands of the law, they will not accept such a strict regime as if this accountability was the same thing as being accounted to the law. Rather given the vagueness of the accountability beyond the national law, they opted for a less strict accountability for their own roles as well, judged by peers who understand their positions.

7.6 Effectiveness of the Outcome

When a case has been deposited at the secretariat of the Global Compact, a dialogue is started among the relevant participants. They include the Office of the High Commissioner of Human Rights, the International Labor Organization, the UN Environment Program and the UNDP for country-level programming, the International Confederation of Free Trade Unions (IFCTU), an association of national and sectoral labour federations, and more than a dozen NGOs in the thee areas covered by the GC, such as Amnesty International and the World Wildlife Fund.[53] The result of this dialogue will be evaluated within the company concerned.

In general one can say that the Global Compact relies on transparency between the 'enlightened' self-interest of companies, labour and civil society organisations to initiate and share substantive action in pursuing the principles upon which the compact is based. One cannot expect pressure on the actors other than stakeholder/peer-pressure. This does not mean that anything goes. The actors are well

[53] Ruggie 2001.

aware that at some point a decision must be taken with regard to multinationals that fail to reach the compact's standard:

> ...the main focus must be on getting companies in, not kicking them out. However, the Global Compact has to be made credible and we have to be sure companies are delivering. A company that persistently fails to publish, or says nothing, or says it is opposed to child labour but is found to be using it, should not continue to take part.[54]

In order to support the Global Compact office and the initiative itself, an Advisory Council was created. It met for the first time in January 2002. It is composed of 17 senior business executives, international labour leaders, and heads of civil society organisations, all acting in their individual capacities. The group convenes twice a year. Its mandate is to assist the Secretary-General in forwarding the aims of the Global Compact and to consider issues such as standards of participation to help protect the integrity of the initiative.[55]

The Global Compact is a voluntary network expanding into new territories of corporate citizen initiatives. Typically, the focus is on a consultation network idea. Instruments for closely monitoring and verifying actions undertaken by the multinationals, are lacking, nor are they expected to be implemented. The UN, on several occasions, have made clear that instruments for monitoring and verifying actions do not fall within the mandate of the Global Compact.[56] Much of the language on the function of the Global Compact therefore reflects the 'consultation focus' of the initiative. Multinationals are 'in dialogue', organise 'support networks' and 'share examples of good practices'.[57]

Given this approach and the strict criteria for entering this initiative, NGOs have been wary to enter into consultations with the multinationals within this framework. Amnesty International entered the compact, while Greenpeace and Friends of the Earth stayed out. Another important NGO in this respect is Corpwatch, an association of NGOs who are critical of the associations between the United Nations and large corporations. But even NGOs that are participating in the network have their doubts. They do not consider themselves to be 'partners'. They rather see it as an opportunity to directly talk to the representatives of important multinationals, who they otherwise would not have been able to address.[58]

This uneasy relationship might be explained from the way in which NGOs are regarded in Global Compact publications. The argument presented is that NGOs have grown to fill an international governance void – left by nation states incapable to address human rights issues properly – and thereby are progressively influ-

54 Guide 2003, p. 8.
55 Guide 2003, p. 5.
56 Guide 2003, p. 4.
57 Guide 2003, p. 8.
58 OneWorld 15.01.2002.

encing both public policy and the market agenda.[59] NGOs are now calling for strong binding rules on multinationals:

> First ...we would like to see companies who join the Global Compact make a public statement that they will be open to independent monitoring...Secondly, it has to reported publicly ...all the stakeholders are entitled to have the information resulting from that independent monitoring. And thirdly ...a sanctions system has to be envisaged ...so that companies who violate these principles cannot continue to benefit from the partnership ...We think that those three steps are absolutely essential if this initiative is to be effective, credible, and win the trust of human rights organizations.[60]

The tensions between NGOs and multinationals on the issue of binding rules on corporate citizenship could explain the relative small number of NGOs participating at the highest levels of the Global Compact. However, the consultative role of the NGOs seems to be more effective at the grassroots level were the NGO are more involved with the compact than at the international level.[61]

With regard to the compliance of the multinationals with the principles of the compact it must be noted that basically the NGOs have three objections. These can be illustrated by the position of Human Rights Watch. According to Human Rights Watch there is, first of all, a lack of legally enforceable standards. Secondly, according to the NGOs, there is a lack of a monitoring and enforcement mechanism. Finally there is a lack of clarity about the meaning of the standards themselves.[62] In order to overcome this critique a website was created by the global Compact office on which specific cases were posted as examples.[63] Furthermore, in a guide to the Global Compact was published in order to ensure a practical understanding of the vision and the nine principles. In this guide 19 concrete examples were presented which included the following multinationals: DuPont, SAP, British Telecom and BASF.[64]

Dupont, for example, explained how its concern for human rights had triggered its concern for safe and healthy working conditions.[65] It then set out how it had introduced these measures in the organisation. Yet the example is odd, because DuPont explains how this was part of policies that had been developed in 1994, well before the Compact started.[66] Another example was provided by SAP who ran a successful anti-corruption program in Africa. However corruption was not an issue in the Global Compact.[67]

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59 Guide 2003, p. 25.
60 Pierre Sane of Amnesty International on July 26th, 2000, quoted in Corpwatch 2000, p. 5.
61 ICC Secretary-General Maria Livanos Cattaui in IHT 25.01.2001.
62 Human Rights Watch 2000.
63 www.unglobalcompact.org.
64 Guide 2003.
65 One wonders why the company apparently had not been bothered about these issues before.
66 Guide 2003, p. 21.
67 SAP argues that fighting corruption should be the 'tenth' principle, Guide 2003, p. 23.

When looking at the Guide to the Global Compact one finds a number of examples of NGOs operating with multinationals at grassroots level. These NGOs are not big international NGOs, but local or national NGOs. They are deemed valuable as can be deducted from the following quote in the chapter on preventing child labour:

> ...discovering if child labour is being used can be very difficult, for example in the case where documents or records are absent, and companies may consider using local non-governmental organisations, development organisations or UN agencies to assist in this process.[68]

It seems that, in the eyes of the UN and the multinationals that created the Global Compact, local NGOs are more useful in providing networks of support and consultation for the initiative than international NGOs. That is not to say that international NGOs do not have a role, but this role seems to be more on the outside, monitoring the Compact through what has been published on its website and reacting to the developments through their own websites and contacts.[69]

In conclusion, the Global Compact focuses on voluntary compliance with its principles. It is not very clear how compliance on paper relates to compliance in reality. Furthermore, the early examples are unclear as to how they are the specific result of the start of the Global Compact. In order to ensure the integrity of monitoring this voluntary NGOs are asked to help with the evaluation and a special advisory council was created. Not all major global NGOs are directly involved. Some have chosen to stay outside the initiative.

7.7 Analysis

This case-study looked closely at the creation and first stages of the implementation of a new global governance network on the subject of corporate social responsibility. The Global Compact is partially rooted in the already existing networks of International Law, i.e. the UN, and partially reaching out to new actors in corporate and civil society sectors.

Firstly, the most significant stakeholders in this emerging global governance network consisted of the (office of) the UN Secretary General, the multinationals and some large NGOs. In 1997, the new UN Secretary-General faced an organisation in a major financial crisis. This crisis was largely caused by anti-UN policies in Washington. These policies resulted in a huge backlog in US contribution payments to the UN. Especially the American Congress was not willing to change its policies without large scale 'reform' of the UN.[70] The Secretary General had to

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68 Guide 2003, p. 38.

69 UN 12.02.2002.

70 According to David Halberstam there was a hardcore group within the Republican party who from the early 1990s onwards favoured 'everything from non-payment of the UN dues to further cuts in foreign aid to outright isolationism'.(p. 147). The US dues contained much of the money needed for peacekeeping operations. The failed US peacekeeping intervention, backed by the UN in Somalia in 1994 made the relations even worse (Halberstam 2003).

find new partnerships that could provide support the work of the UN in one way or another.

At the same time, multinationals faced more and more questions on corporate responsibility. One of the results of the policies pursued by the new Secretary-General has been that these issues became entangled. New bonds were forged between the UN and multinational corporations and between multinational corporations and some NGOs. States only became later involved with this initiative, and even then at a secondary, supporting level, although US policies and pro market-attitudes seem to have influenced the political and policy context within the UN at the time when the first initiatives were being undertaken.

Secondly, within the three categories of stakeholders, the UN, the multinationals and the NGOs, the first two had significant capacities to influence events. The multinationals, 'owned the problem' and had financial means; the UN needed 'success stories' and (financial) support, preferable by other parties than nation-states. In return of their cooperation with the Global Compact, the multinationals gained a system that would be 'workable' and not too formal: a voluntary code. The UN gained the much wanted 'powerful' international support, and, in some cases, extra financial means. The NGOs played a role in this process, but were not considered by the UN, nor by the multinationals, to be key-stakeholders needed to make the system work. Thus, the non-state capacities of the multinationals were significant with regard to influencing the UN, whereas the non-state capacities of the NGOs were not very useful as these capacities did not address the key interests of either the multinationals (who were looking for voluntary codes) nor the UN.

Thirdly, the accessibility procedures to the Global Compact for multinationals has been quite straight forward: send a letter, start motions to change, publicly advocate the compact and mention something in your annual report. NGOs faced a more demanding set of criteria. This can be explained from the fact that the business lobby (ICC and WBCSD) did not fancy critical NGOs coming in. The rules determining the peer review system between the multinationals were not very demanding and there were hardly any consequences when the participants would fail to uphold the 9 principles. The fact that examples (best practices), having no direct relation with the Compact itself, were provided by the multinationals in the early stages of the compact is telling. This had to change, and new procedures and criteria were determined. Now non-participants can follow some of the proceedings of the compact through the website, but detailed information on the inner workings of this network are presented on a 'sealed off' section of the website.

Fourthly, the legitimacy of this specific global governance mechanism depends partially on its transparency. With regard to the actors involved in this process, the initiative has been transparent. However, their accountability has been located within the parameters of the compact, through peer-review. It is not allowed to report on these processes outside the proceedings of the compact. When reports occur, they have been closely scrutinized as not to cause any harm or reveal important business insights. Thus, it is not possible for any organisation outside the

Global Compact, or the general public, to hold companies accountable through the Global Compact mechanisms.[71] This is significantly different from the procedure discussed in the previous chapter on the Fair Labor Association. In that case, there was a third party complaint mechanism in place. Thus, the legitimacy of the compact based on its transparency is problematic. This problem could, theoretically, be overcome by pointing out that states, through the GA, have approved of the mechanism as an important initiative. Having gained, in retrospect, state approval could be seen as a creating a form of legitimizing (or at least tolerating) the compact within the larger framework of UN regulatory arrangements.

Fifth, the legitimacy of a mechanism of global governance is also based on its effectiveness. Initially, the idea that the effectiveness of the compact could be measured was doubted, until the Global Compact Summit of 2004. In preparation of this summit, McKinsey & Company had been asked to assess the Global Compact's impact. The McKinsey report concluded that:

> '...the Global Compact has had noticeable, incremental impact on companies, the UN, governments and other civil society actors and has built a strong base for future results. The Compact has primarily accelerated policy change in companies, while catalyzing a proliferation of 'partnership' projects, development-oriented activities that companies undertake with UN agencies and other partners. The Compact has also developed a solid participant base and local network structure, establishing itself as the largest voluntary corporate citizenship network of its kind. In addition, the mere existence of the Compact exerts a surprisingly powerful influence on companies and within the UN, empowering champions for reform'.[72]

There were also some areas of the Global Compact that needed extra attention:

> '...inconsistent participation and divergent and unmet expectations limit the impact on companies and continue to threaten the Compact's long-term credibility with participants. As it transitions from its entrepreneurial, experimentation phase to a phase of sustained growth focussed on impact, the Global Compact will need to manage participants' expectations by increasing the value of participation with more targeted business orientated management mechanisms, robust local networks, and effective communication and collaboration with participants and partners'.[73]

It seems that, despite the criticism that one might voice on the inclusiveness of the compact and its transparency, things are changing for the better with regard to implementing the 9 principles of the Global Compact in the day-to-day operations of the affiliated companies. In other words, the Global Compact seems to be an effective regulatory arrangement that influences behaviour of non-state actors.

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71 Contrary to for instance the FLA mechanisms, see: chapter 6.
72 McKinsey&Company 2004, p. 2.
73 McKinsey&Company 2004, p. 2.

7.8 Conclusion

The Global Compact is an innovative way forward on a policy issue that seemed unsolvable within the UN General Assembly. In order to overcome this problem, the UN-Secretary decided to come up with an initiative that bypassed the policy-realm of the General Assembly, but stayed within his own mandate.

The Global Compact was a pragmatic leap forward out of specific circumstances which seemed to permanently obstruct real progress on these issues. It took the responsibility for the protecting of human rights, labour rights and the environment into the business domains of international society. Until that time, most of the global business sector had denied having any direct responsibility unless their national governments would legally force them to do so. This raised the question on the precise nature of the relationship between this new regulatory arrangement and the traditional body of International Law with regard to the protection of human rights, labour rights and the protection of the environment. It seems that the Global Compact is to achieve the goals of the International Law, while avoiding the disagreements between state-actors over regulatory arrangements in International Economic Relations on this issue.

The Global Compact succeeded in making multinationals co-responsible stakeholders in the protection of internationally accepted Human Rights, labour rights and environmental concerns. NGOs might at times have felt left out of the most important decisions, but it seems that the Compact is achieving results, actually changing business attitudes and behaviour towards more corporate social responsibility and sustainable development.

In conclusion, content-wise there exists a close relationship between the principles that the Global Compact seeks to defend and the traditional body of International Law. However, when it comes to the execution of responsibilities with regard to those principles, innovative ways have been developed that have transformed multinationals and (some) NGOs from bystanders into responsible stakeholders. At the same time, by creating a new regulatory arrangement this strategy bypassed the trap of the initiative of getting bogged down in endless political debates in the General Assembly. In the end, the General Assembly formally recognised the Compact after its creation and acknowledged its support to it. These practical results and its future potential make the Global Compact more than a symbolic gesture. In the words of the UN Secretary-General: 'symbolism is good, but substance is even better. And I believe we have made important substantive progress...'.[74]

[74] SG/SM/9387 ECO/71 24.06.2004.

8. Comparative Analysis

8.1 Introduction

Comparing the interactions between emerging arrangements regulating International Relations and the traditional body of International Law allows us to capture something about the larger patterns and growing complexities in those areas of International Relations that are influenced by the spread of the global free market and the information and communications revolution. The fact of overlapping and interacting national and international networks of concerned constituencies, both of the NGO and corporate type, have made the new realities of International Relations highly complex and only partially understood The traditional set of building blocks of International Relations and International Law seems to have gained new additions through the growing importance and impact of the capacities of non-state actors.

In the previous three chapters we explored three cases in particular detail. All three displayed regulatory transformations either within the existing frameworks of International Law or bypassing those frameworks in order to overcome political deadlocks.

The use of case studies has been limited to three and has remained largely explorative. Given these limitations, this chapter will try to discern some of the larger patterns that might be emerging in the current dynamics of regulating International Relations. It will present a comparative analysis of the five dimensions for observing change and continuity in the relationship between International Law and International Relations using the materials from the case studies. The outline of this chapter is based upon the empirical framework introduced in chapter 4. Section 2 will analyse the patterns in the positions and capacities of the actors. Section 3 will discuss the differences and similarities in the accessibility of the governance regimes. Section 4 will analyse the issues of legitimacy and effectiveness.

8.2 Position and Capacity of Global Actors

International Law consists of rules and principles that are generally applicable in the conduct of states and international organisations and in their mutual relations, as well as with some of their relations with other actors. On many occasions, these state-based rules and principles have influenced the position and capacity of actors, but not only such state-based international rules have had influence. In some cases national rules influenced actors' positions and capacities, in other cases (in)formal policy rules affected the positions and capacities of the actors.

First, we will compare the positions of the various actors in the case studies and examples. Did the recognition of actors as important stakeholders depend on state-based International Law, or were there also other factors that determined

the recognition of an actor as a important stakeholder? Secondly, we will look at the capacities of the actors. Which factors determined the capacities of the actors during the creation, implementation, and functioning of an emerging International Relations regime? Were state capacities affected by rising non-state capacities? Or did non-state capacities develop without significantly affecting state capacities?

8.2.1 Position of Global Actors

Can the position of actors as important stakeholders in an emerging arrangement regulating International Economic Relations be explained from state-based International Law theories? In order to answer this question, we first have to recall what those theories have said with regard to stakeholdership in International Law. In chapter 2 we saw how the concept of sovereignty has developed into a theory supporting the claim that the nation-state occupies the primary position in International Relations and, therefore, in International Law. International Law was developed in response to the regulatory needs arising from problems and challenges that had been recognised and experienced by these stakeholders.

Although International Relations is still very much an state affair, new non-state stakeholders have gradually become established within political arenas that hitherto had been inaccessible. The empirical data seems to suggest that today non-state actors are able to position themselves in ways that enable them to become involved in informal policy networks, and thereby with the creation of proto-laws. Gradually, these proto-laws are becoming part of an alternative international rules network.

In the run up to the Global Compact, the Fair Labor Association, and the Basel Agreement, non-state actors even found themselves in key positions. In the case of the Fair Labor Association, NGOs and multinationals were treated as equal partners, and primary responsible partners and the encouraged by the state to develop a new voluntary regulatory mechanism, which would be backed by the state (although not adopted). In the case of the Global Compact, the UN general secretary involved the NGOs and multinationals directly. States were in a position to endorse the new initiative afterwards. And, finally, in the case of the Basel agreement, the representatives of the national banks, united in the Basel Committee, practically forced their national policies to conform to the agreement, thereby affecting the independent position of states in international financial affairs.

In general, it seems that the number of stakeholders in International Relations has grown significantly. In some cases the states have actively encouraged this growth (Kyoto). In other cases, the growth in the number of stakeholders occurred in response to the lack of state engagement with a problem. It seems that in such perceived vacuums the absence of states does not necessarily lead to an absence of regulatory mechanisms.

In conclusion, the positions of non-state stakeholders in regulatory regimes of International Relations are not always occupied to the detriment of state positions.

In other words: the expansion of non-state actors in International Relations networks is not necessarily resulting in a zero-sum game with nation-states over stakeholdership and formal positions. International Relations networks seem to consist of more important (and relevant) stakeholders than more traditional state-based International Law networks.

8.2.2 The capacity of global actors

The cases and examples seem to suggest that the rules determining the capacity of an actor to operate in an International Relations network are made up of elements of state-based International Law and rules created by (informal) policy networks. In this section we will first determine how this development has affected the capacities of state actors. Then we will determine the impact of these developments with regard to the non-state capacities.

8.2.2.1 The capacities of state-actors in emerging regulatory arrangements

For a long time, state actors seemed to be perfectly capable of adequately operating in response to global problems and challenges. In the context of globalisation processes and their effects, however, this capacity is being questioned, not only theoretically – see chapter 3 – but also practically.

In the case of the Kyoto Protocol, states behaved as if they were in complete control of making the goals of the protocol work. Yet, the creation of the protocol and the subsequent seven year process of ratification have raised serious doubts about states' ability to respond quickly and adequately to the complex issue of climate change.

In the case of the Fair Labor association, the state began to act only after a public outcry against the working conditions in the apparel industry. While the President of the United States provided the initiative with a high-profile background, the stranding of legislation on these working conditions illustrates the internal hurdles that at times obstruct adequate and timely state responses to an international problem. The state was sending out two messages, Congress vs. the President, at the same time.

The Global Compact resulted from two separate problems in International Relations. The first problem occurred with regard to state support for the United Nations, forcing the UN secretary-general to look for new international supporters, such as multinationals and NGOs. The second problem was the failure of states to agree, within the political and legal framework of the United Nations, on criteria for corporate social responsibility with regard to human rights, labour rights, and the protection of the environment. In tackling both problems at once, the UN Secretary-General devised a new strategy. This strategy bypassed the states by directly appealing to the multinationals and NGO communities. It was only in the aftermath of the establishment of the Global Compact that states were asked to agree with its outcomes.

This is not unique when we recall the prologue discussing the creation of the Basel Committee. In that case there seemed not much leeway for nation-states to influence the developments once the regulators of the American Federal Reserve and the Bank of England had reached an agreement.

In conclusion, states are not always capable of responding adequately to the new problems and challenges in the context of economic globalisation. In response to many challenges, the old state reflex has been to come up with yet another international agreement. The limits of that response are becoming more obvious, as complex agreements take a long time to materialise in practical policies and behaviour.

8.2.2.2 The capacities of non-state actors in emerging regulatory arrangements

The case studies seem to suggest important changes with regard to the capacities of non-state actors to operate adequately with regard to global problems and challenges.

Multinationals were able to influence the shape and content of international rules in the policy networks of the Fair Labor Association and the Global Compact. Likewise they have become involved in issues of enforcing (inter)national rules in their own operations and in the operations of actors operating in the supply-side chain.

An important development with regard to multinational behaviour occurred during the Kyoto negotiations, when multinationals – by creating large NGOs – were able to enter UN networks. Through the Fair Labor Association, multinationals assumed responsibility for working conditions in sweatshops outside the United States producing goods for the US domestic market. Multinationals became responsible through the Global Compact for implementing nine principles with regard to human rights, international labour rights and the protection of the global environment.

To a slightly lesser extent, NGOs have become part of the frameworks through which International Law is being created. During the Kyoto negotiations they were allowed to 'watch from the sideline', and were consulted, but did not have real power. A similar position was occupied by the NGOs surrounding and participating in the policy dialogues of the Global Compact. They gained access to the Global Compact at a point where all the important decisions had already been taken. Contrary to these developments stands the process of creation of the Fair Labor Association. There the capacities of NGOs equalled those of multinationals. Both types of actors were accountable to the US President, and both could contribute their suggestions equally.

In the case of the Kyoto negotiations, great care was taken by states to limit the capacities of non-state actors directly to influence the negotiation processes. There were only a limited number of observers present during the negotiations themselves, and they had no right to be involved in the discussions at the negoti-

ating tables. In the case of the FLA and the GC the capacities of NGOs were not restricted straight away because of the relative lack of state involvement. But some sort of restriction was present: participants in the FLA were restricted by US domestic laws; those in the GC were restricted by the mandate of the Secretary-General of the UN which only allowed him to get involved in non-binding regulatory initiatives.

The example of the Basel Committee is different with regard to the capacities of non-state actors. In this particular example it seemed that non-state actors were completely in control of all capacities needed to enforce a new set of policies with regard to the regulation of the international financial order.

In conclusion, NGOs and multinationals seem to have developed important capacities with regard to influencing the enforcement and control of international rules. These capacities seem to be expanding through newly created international initiatives. Occasionally non-state actors find that they have only been able to enter the outer-ring of an international arena, and not the real playing field. Both the FLA and the GC presuppose the active cooperation of NGOs in controlling the actions of other actors (multinationals) in International Relations. The Kyoto-protocol, on the contrary, does not provide any role and/or capacities for NGOs in the enforcement of the Kyoto-criteria. Finally, the operations of the Basel Committee provide an early example of a policy network that bypassed some of the individual state-capacities to regulate (parts of) the international financial order.

8.2.3 Conclusions

This section has tried to answer two questions about the position and capacity of global actors. The first question looked at the acknowledgement of non-actors as important stakeholders in a particular network. The second question assessed the capacities of those stakeholders during the creation, implementation, and subsequent functioning of a new international regulatory mechanism.

First, with regard to the recognition of non-state actors as important stakeholders in a particular governance network, it can be concluded that non-state recognition has not arrived at the expense of formal stakeholderships of state-actors. This conclusion is in itself perhaps not so shocking. But what it helps to illustrate is that new arrangements for regulating International Relations does not necessarily occur at the expense of formal positions in International Law. They are still there. Whether these actors are primary stakeholders is, first and foremost, a political decision ("yes" in the case of global warming, "no" in the case of the UN General Assembly with regard to corporate social responsibility).

It seems that part of the answer to the question of the relationship between new arrangements for regulating International Relations and the traditional body of International Law, is that it is primarily a state-actor decision. Either state-actors get involved as primary stakeholders, and when that happens the whole mechanism of International Law comes into play (Kyoto Protocol), or they do not get involved,

or do only in a secondary role, and then International Law may (Global Compact) or may not (the Fair Labor Association) provide a foundation for the emerging regulatory mechanism.

Secondly, with regard to the growing capacities of non-state actors, it seems that their capacities have developed at little or no expense to the already established capacities of state-actors. NGOs have been particularly successful in setting the agenda on some of the new issues and problems. In some cases, they extended their capacities by getting involved in a policy network that created and implemented pseudo-laws, and addressing others through these pseudo-laws. In other cases, multinationals are starting to be addressed on the basis of existing international legal standards, and have also started participating in the making and enforcement of these.

In conclusion, the enhanced positions and capacities of non-state actors in emerging International Relations regimes is at times ambiguous and confusing. A certain expansion of these positions and capacities has taken place, but apparently without great costs to the existing positions and capacities of state-actors, the only exception being the Basle Committee. The addition of these new actors has increased the capacity of global regulation, without necessarily ignoring the developed state-based rules. The new stakeholders can create a regulatory bypass system of International Law that takes the pressure off the state-actor system to do so. And, occasionally, they might even have a position and the capacity to bypass the existing mechanisms altogether (FLA, Basel Committee) and 'export' a domestic rule system (FLA).

8.3 Access to global arenas

The interactions between the stakeholders of a network constitute a literal and/or virtual arena. The borders of this arena are determined by the distinction between those stakeholders who are participating in the interactions, and those who might, or might not, be part of the network, and who are not participating, or who want to gain access to the interactions. This distinction is important. The question of whether International Law functions as the basis of a new governance mechanism is determined by those stakeholders who are 'in' the arena. Therefore, the question of accessibility to the arena is crucial. There seems to be a correlation between the number and sort of stakeholders in the arena, and the embeddedness of the new governance mechanism in existing state-based International Law mechanisms.

The Kyoto negotiations displayed a strong drive for institutionalisation of a state-based International Law response to global warming. Being part of the larger framework of UN arenas on the environment, this particular arena further specified the obligations of state actors already involved with regard to the specific point of regulating the emission of greenhouse gases. The idea seems to have been to further enhance the existing international legal frameworks in this field, by filling specific gaps from within the existing system. However, at an informal level

the negotiations have been relatively easily accessible, especially for multinationals posing as NGOs.

The Fair Labor Association started as a regional response to working conditions in the apparel industry. American NGOs and American multinationals, by invitation of the American President, developed a framework of rules in response to pressure by the American public to the working conditions in the factories of (foreign) apparel companies that cooperated with these multinationals. Although this initiative started in the American public arena, its network reached out across the globe through its application by the participating stakeholders. But it is a limited initiative. The FLA works only through the American multinationals that are participating. This number of actors is limited, and the impact with regard to FLA standards on the conditions in the clothing and footwear industry can only come from these actors. So, although the FLA was an initiative open to new actors, this is in practice restricted by geographical restrictions (only American multinationals and American NGOs under American law).

At a first glance, the Global Compact seems to be the most accessible network, because it has remained open for new participants to enter. Yet, it is more difficult to enter the Compact now it has been created, than it was when the creation process was started. The Compact is more readily accepting new multinationals than new NGOs. Like the Kyoto-protocol, the fact that the Global Compact started within the institutions of the United Nations, meant that at least part of the compact, with regard to the content, has been based upon existing state-based mechanisms for the protection of human rights, labour conditions and the protection of the environment.

The accessibility of the Basel Committee has been very restricted from its beginning. It had no formal restrictions, but in practice it consisted of representatives of the G-10 countries plus Luxemburg. During the period discussed by the example at the beginning of this study, no extensions of membership have taken place. There were no international rules with regard to the issues the committee was concerned about. As a consequence there was no possibility of embedding their proposals in existing International Law.

In conclusion, we are left with mixed impressions. State initiated networks may remain closed to non-state actors, or may accept non-state actors in a secondary position. Non-state initiated networks, and those not primarily state-initiated networks have been more open to non-state actors. But the relation of these apparently obvious conclusions to the main question is harder to explain. State involvement does not automatically ensure embeddedness in International Law as the FLA demonstrates. On the other hand, non-state embeddedness does not mean a turn away from International Law, as the Global Compact illustrates. And in the case of the Basel Committee embeddedness was impossible even if the stakeholders had wanted it, because there were no other mechanisms this initiative could relate to.

8.4 Legitimacy and Effectiveness of Emerging Regulatory Arrangements

We have looked at the actors and the accessibility of the arenas in which they operate. But what makes their actions legitimate? And are these new arenas effective in any way? In this section, both these questions will be discussed.

8.4.1 Legitimacy of emerging governance regimes

It seems that there are at least two dimensions of legitimacy at play with regard to the emerging regimes. On the one hand there is input legitimacy. On the other hand there is process legitimacy.

First, with regard to input legitimacy, the main question is: is it possible to see who made what argument and who spoke to whom during the creation of the governance mechanism?

During the Kyoto negotiations, the input of NGOs was officially regulated and acknowledged. They could lobby in the corridors during the negotiations, and some were present during important informal meetings. The fact that multinationals were also allowed to enter the arena, points to the concern on behalf of the United Nations to have as many actors involved as possible. However, most non-state input remained restricted, quite literally, to the corridors. No direct evidence has been found that the non-state actors' input had any influence on the final text of the Kyoto protocol.

By creating the FLA, the US President enabled the direct input of stakeholders in devising a regulatory solution to domestic public concern over working conditions in US-owned apparel industries outside the United States. The input of the stakeholders seems to have enabled the creation of a workable system for all parties involved, but also a system that all parties have been willing to accept when it came to providing accountability for their own obligations.

Likewise, the success of the Global Compact depends on the direct input of stakeholders and their involvement in building a new peer-review system from scratch. It is highly unlikely that multinationals would have accepted proposals for a regulatory system without their preparatory involvement. But this is also true for the NGOs. Much of the criticism by NGOs with regard to the Compact could be explained from the fact that they had not been involved in its creation.

Moving to the second dimension of legitimacy, this is based on the process through which the new mechanism are being created. Part of this dimension seems 'virtual', as events are not transparent during the actual process itself, but only become transparent afterwards.

The element of transparency seems to refer to a virtual transparency of the processes in the arenas. In Kyoto, the negotiations were in practical terms not transparent because the most important decisions were made behind closed doors (and even aside from the official negotiations). Outsiders were kept informed

through the media present in the corridors. The Global Compact boasts its 'transparent' structures, but this refers mainly to its website where most, filtered, information can be found. The detailed outcomes of meetings are presented in a screened-off area of the website that is not accessible to non-participants.

The FLA is the exception to these developments, in so far as it dares to present the 'dirty laundry' of participating actors in the reports presented on its website. The main reason to abstain from participating in the FLA is that this kind of transparency gives rise to the fear among subjects that speaking their minds freely, and having this recorded, could spark a rush of legal claims.[1]

It seems that transparency of processes is not automatically 'given' in the emerging arrangements regulating International Law. Sometimes, transparency remains locked behind external restrictions (such as restricted Internet access) that are lifted only for those on the inside of the arena. However, this restriction seems to have been crucial to win over important stakeholders to participate in the new regulatory responses. It is inconceivable that a multinational would be willing to participate in the Global Compact if there was any risk of having to hand over crucial business information to the general public (and thereby also to competitors).

In conclusion, it is fair to say that a large part of the legitimacy of emerging arrangements regulating International Law depends on the level of transparency at their creation, both with regard both to the input of actors and to their behaviour during the process of creation. Transparency has not been helpful in all circumstances, however, and some regimes would not have been created if they had had to be as transparent as the FLA for instance. Transparency has not been able to replace older state-based notions of legitimacy completely.

8.4.2 Effectiveness of emerging governance regimes

To a large extent the acceptance of state-based regulatory solutions to problems and non-state based regulatory arrangements depends on whether the solutions actually work. Have the stakeholders in an arena succeeded in creating a working solution to a problem in need of regulation? In the case of the emerging arrangements regulating International Law, this question becomes even more important. Are the new arrangements as effective as, or even better than, more traditional state-based mechanisms? Or would a stronger embeddedness in state-based regulatory mechanisms have made for more effective arrangements?

The Kyoto Protocol is the typical outcome of a state-dominated process. It is a typical agreement to disagree. Other stakeholders were denied responsibilities or influence from the moment the ink had dried. It has taken many years before the protocol had been ratified, and many countries abstained from taking measures to implement the criteria of the protocol before they were sure that the mechanism would come into being.

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[1] In literature it has been asserted that this has been the major reason why US multinationals abstained from participating in the Global Compact.

The Global Compact seems at first glance to fall outside the range of International Law although its contents refers to important statutes of Human Rights, Labour Rights, and Environmental Laws. Furthermore, the compact has been effective in protecting these rights. A 2004 McKinsey study confirmed that the compact has had noticeable incremental impact on the subjects involved, accelerating changes in multinationals and developing a strong network and a solid participatory base.[2]

On the other hand, the FLA illustrates a development whereby domestic laws are becoming international 'proto'-laws, creating an impact around the world. Instead of adopting existing International Law standards, for which no support could be mobilized in the US Congress, the American administration advocated the creation of an enforcement mechanism through which American laws would become standards for companies co-operating with US-based multinationals. In fact, a system of soft law was created with a global impact, while none of the subjects involved advocated bringing this system under International Law. American economic (consumer) power seems sufficient to provide for the implementation and enforcement of its standards in different countries around the world.

The Basel Committee managed to organise the support for the Basel Accord, the standards of which became general standards around the world through voluntary adaptation by non-committee members.

In conclusion, like transparency, effectiveness is an important dimension when assessing the legitimacy of emerging arrangements regulating International Economic Relations. However effectiveness alone cannot provide the complete legitimacy of a new regulatory arrangement in International Relations. As this sounds much like the previous conclusions, it could be worth developing an understanding of legitimacy for emerging arrangements regulating International Law that would be based upon at least two pillars, one being the relation to the existing state-based regimes; the other pillar containing the issue of legitimacy with regard to both transparency and effectiveness.

8.5 Conclusion

Is the relationship between International Relations and International Law changing? The comparative analysis that was presented in this chapter seems to support that idea. Thus far, the general assumption has been that emerging state based International Law practices were providing the foundations upon which the mechanisms of emerging arrangements regulating International Law were being built. However based on the case studies and the examples presented in this empirical part of the investigation, that assumption can be challenged.

Occasionally the context of International Law and the dominance of state-actors secured an emerging framework within the already existing frameworks of International Law. In those cases, exemplified by the Kyoto Protocol, state actors re-

[2] See chapter 6.

main the dominant actors and have ample capacities to influence the process. But there have been other cases and examples that followed different patterns.

The first pattern, as presented by the Global Compact, introduced a situation whereby the implementation of international legal norms with regard to Human Rights, Labour Law and the protection of the environment became extended to include non-state actors, especially to multinationals. This extension was created by a state-based institution, the United Nations, but without explicit legal foundations. Only after the creation of the compact did states recognise its importance. In this way, the Global Compact can be understood as an extension of the existing system: States gave their approval afterwards. This it is not a dramatic break from the past, but it is a break nonetheless.

The second pattern is one in which a particular state takes the initiative to 'export' specific ideas about regulating a specific social problem. This happened in the case of the FLA, where the US government actively set out, for internal political reasons, to promote worldwide corporate social responsibility for working conditions in the apparel industry. In the US-dominated network to which this led neither International Law nor existing international state-conventions with regard to working conditions in general played a role. The FLA provided a system of international rules, which in future might be recognised or incorporated by other states, but which de-facto function as proto-laws affecting the international trade order. A similar example with regard to International Accountancy Standards was mentioned in chapter 3.

In the third pattern, non-state actors have taken the lead and either amend or bypass existing international legal practices. In the example of the Basel Accord, it was the unregulated influence of representatives of the central banks of the G-10 plus Luxemburg, which helped to create a world wide standard for capital standards. This agreement was so strong that subsequent efforts to change it by the US Congress, representing the largest participating economy, were to no avail.

In so far as the legitimacy of these emerging arrangements regulating International Economic Relations was not based on International Law theories and practices, serious questions had to be raised with regard to alternative resources providing legitimacy. This is partially provided by the transparency of the emerging network, and partially by the effectiveness of the emerging network. Most emerging arrangements regulating International Law seem to contain a combination of the older forms of legitimacy (state involvement or at least state consent) and newer ones (representative non-state actors, openness and results).

In conclusion, foundational changes are occurring in the regulation of the already highly complex systems of International Relations. This chapter discussed changes occurring in five important dimensions of the changing relationship between International Law and International Relations. Together these dimensions have helped us to understand the complex and often confusing character of change. There is not one specific self-evident pattern that presents itself from these transformations. The developments are multifaceted and multidirectional.

The next, and final chapter, will set out to discuss tentatively the three patterns that seem to occur in the ever growing complexity and increasing fuzziness of the interaction between emerging arrangements regulating International Economic Relations and the traditional body of International Law.

9. Evaluation and Conclusions

> "When people set out to prove that nothing has changed, you can normally be sure that something quite serious has. The very fact of feeling you need to show that things are the same implies that there has been an unsettlement of what was once taken for granted. When there is no awareness of things changing, certain questions are not asked; what exists seems obvious, natural. If you have to prove that it's natural, you may succeed or you may not, but there has been a sort of loss of innocence. It has become plain that you can no longer take for granted that everyone really knows what is obvious or natural."[1]

9.1 Introduction

This study set out to explore the interaction between emerging new arrangements for regulating International Relations and the existing traditional body of International Law. The 13th century Italian jurist Accursius held that the function of (public) law was to preserve the system it upheld 'ad statum (...) ne pereat'.[2] Likewise, St Thomas Aquinas wrote that law can only exist derivatively in the system it upholds. Can the same be true for the new arrangements regulating International Relations?

It has become clear that the regulatory transformations in International Relations and International Law can not be understood through a standard account of International Law, globalisation, and growing interdependence. A critical analysis of the changes that are taking place has to take account of the complexity, institutionalisation, formalisation, and dissagregations that occur. Hence, the impact of the change is often fuzzy, confusing, and only partly legible.[3]
In this final chapter, I will present three patterns in which the relationship between new arrangements for regulating International Relations and the existing body of International Law might be developing. Each pattern seems to try to 'preserve' economic, political, and cultural International Relations among nations, 'so that they shall not perish'. The final question remains who or what is providing the normative foundations of these emerging regulatory arrangements in International Relations?

9.2 Bypassing the State (1)

When a bypass is created, it is usually done to create a diversion round an important but problematic area. In medical procedures, a bypass is a passage that is created surgically between two blood vessels to divert blood from one part to another. This is mostly done with regard to the blood vessels of the heart, when important blood vessels are clogged up and the heart is not getting enough oxygen to function properly. A new surgically created bypass ensures the continuing flow

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1 Williams 2005, p. 4.
2 Quoted in: Van Bijsterveld 2002, p. 329.
3 Compare Sassen 2006.

of oxygen rich blood directly to the heart, bypassing the clogged up blood vessels. In some ways, the emerging arrangements regulating International Relations could be compared to such artificially created bypasses to state-based International Law. In this section I will set out how some of the emerging regulatory, arrangements although being founded in International Law theory and practices, are functioning as diversions around important but problematic areas in International Law. These diversions help to keep the state-based International Law system functioning in the context of the growing pressures of socio-economic globalisation. And these diversions depend on extending part of the responsibility for the creation, implementation, and maintenance of international regulation to non-state actors.

The historical introduction to International Law[4] demonstrated how International Law has developed in response to particular problems at particular moments in history. At some point, symbolised by the Westphalian settlement of 1648, states came to be regarded as the primary stakeholders in International Law. Although this particular system of International Law has undergone many transformations since that moment, the essence of the state-based international legal system can still be recognised today.

One of the transformations of this international legal system was the recognition of the role of non-state actors in International Relations. Of course, there have been a few non-state actors involved from the very beginning of the Westphalian law system, the Holy See and the Sovereign Order of Malta, but they had historical claims and roles that pre-dated the creation of the Westphalian system. In general, the Convention of the International Committee of the Red Cross, is often being named as the first non-state extension to the state-based system of International Law. After that first extension, more and more non-state actors have become involved with many elements of the international legal system. In literature this non-state involvement has been compared with a custodian role. Non-state actors are expected to guard, protect and maintain International Law. This shift seems to have had more advantageous effects for the position of multinationals in International Relations than for the many NGOs operating in International Relations. This shift has also been noted by Sassen:

> Such shifts from geographic borders to embedded bordering capacities have been far more common and formalized in the case of major corporate economic actors than they have, for example, for citizens and migrants. Firms and markets have seen their advantages shift towards new types of institutionalised protections...The institutionalised human rights regime is a much weaker system than the WTO provisions...As national states are directly and indirectly involved in both human rights and these business regimes, one question it raises is how much divergence in critical regimes a system can accommodate.[5]

4 See Chapter 2.
5 Sassen 2006, p. 417.

However, if we take the custodian metaphor seriously, then they can, by definition, never be responsible for the creation of International Law. They carry out their role and duties with regard to something that will be, or has been, created outside their direct sphere of influence. They may have indirect influence through their involvement with the creative processes of International Law during international conferences and meetings. At those occasions they exert influence through lobbying, organising public protests and, through modern information and communication technologies, raise general public awareness of a global issue in need of regulation. Occasionally, this role might go further, when non-state actors help to put an issue on the global agenda, thereby practically forcing state actors to respond to these issues.

Most of these interactions take place within existing networks of International Law. The network most commonly referred is to the United Nations system. The UN system has its own 'rules of the game'. These rules determine the interactions between state and non-state actors. The Kyoto negotiations-case offered an almost classic example of such interaction. Non-state actors can improve their relative position, for instance the multinationals creating a UN-recognised NGO, whereas multinationals otherwise would not have had access. But both new and old non-state actors seemed not able to directly affect the content of the Kyoto Protocol.

So far, the discussion of the custodian role of the non-state actors might not have seemed very different from discussions held in the 1960s and 1970s of the role and position of non-state actors. However, the Global Compact case displayed a significant break-away from earlier practices.

The Global Compact was initiated from within the state-based structures of the United Nations, but aimed to overcome a political impasse between the states over the international regulation of corporate social responsibility with regard to human rights, labour rights and the protection of the environment.

In order to overcome that impasse between states, the UN Secretary General created a bypass to save the UN's commitment and concern with regard to human rights, labour rights and the protection of the environment in the workplace. This bypass respected the existing international legal structures, but brought in more stakeholders to ensure real change in the workplace. This marked a significant change in thinking. Theoretically states are responsible for implementing and maintaining International Law. But they may not always do so, especially when the national economy is at stake. By involving directly the important stakeholders, the multinationals, the UN became less dependent on states. Furthermore, they were now talking to the organisations that actually had to make the changes directly. And, through the involvement of the NGOs, the Global Compact also involved organisations that could influence both national governments to ensure implantation of the principles, as well as the general public. Multinationals benefited as well, as they could finally discuss the practicalities of the protection of human rights, labour rights, and environmental protection, and gain public sympathy through the well respected image of the UN. Critics have described this ap-

parent win-win situation as the 'blue-washing' (after the UN-flag) of corporations. It remains to be seen how successful this new global governance mechanism will be to the already existing international legal state-obligations to the protection of human rights, labour rights, and the environment.

These findings are confirmed by others in different research programs, using different methods for research. A project by Cooper, English and Thakur on alternative leadership and new diplomacy within the United Nations and the effectiveness, legitimacy and possibility of codes of conduct came to almost similar findings:

> Whatever view is taken concerning the extent and impact of "turbulence" within the specific context of the United Nations, it seems clear that the emerging pattern of diffuse interaction and multiple forms of leadership matters. Rather than discarding or avoiding the UN system, this activity aims to make it more operational and more transparent. The need, then, is to look more closely at these non-traditional sources of leadership and innovation so as to be able to understand and deploy this multifaceted dynamic better.[6]

Likewise, Grande has argued that the recent developments in International Law in the context of globalisation or not diminishing the role of nation states, but creating practical new responses to new problems and challenges:

> Ich werde gleichzeitig aber auch behaupten, daß diese transnationalen Politikregime die Bedeutung des Nationalstaats nicht verringert, sondern ganz im Gegenteil vergrößert haben. Transnationale Politikregime...ersetzen den Nationalstaat nicht, ihre Funktionsfähigkeit hängt vielmehr entscheidend von der Kooperations- und Handlungsfähigkeit der Nationalstaaten ab.[7]

In conclusion, the kind of bypasses discussed in this section have a long history and have been noted before. What has been new is the scale and scope of these emerging regulatory mechanisms, both in numbers of actors and in countries and organisations affected. Many emerging regulatory mechanisms are innovative extensions of state-based International Law theories and practices. As such these bypasses help to implement and maintain existing International Law. However, there have been other bypasses as well.

9.3 Bypassing the State (2)

Although bypassing might have a positive connotation in medical terms (but also in traffic terms: the road that helps traffic to avoid a busy town centre), it can also have a more negative connotation. To bypass can also mean intentional neglect

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6 Cooper 2002, p. 16. In this study David Malone noted that "The new diplomacy, with governments remaining the critical actors but with many other participants shaping the context for negotiations and serving in advisory capacities, has proved better equipped to tackle challenges of institutional reform and identify and promote important emergency issues than the hidebound world of established multilateral diplomacy." In: Cooper 2002, p. 51.

7 Grande, 2004, p. 384.

of something or somebody. The case-studies and examples have also provided examples of the intentional neglect of International Law in favour of norm-export or 'proto-laws', rules that have been created in informal policy networks, which seem to resemble legal orders, and which have the potential to become endorsed by states in the future, but nonetheless function as regulatory international rules today.

The case of the FLA helps to illustrate the first type of intentional neglective bypass. As the Global Compact illustrated, by the mid 1990s there already existed a wide range of international treaties with regard to working conditions in general. And from 1919 onwards, the International Labour Organisation has been functioning as the specific international policy network with regard to these issues. Within the ILO both manufacturers and labour have been represented. Yet, these existing frameworks were not part of the events and deliberations that led up to the creation of the Fair Labor Association. The FLA has been founded upon US consumer attitudes towards labour conditions and made only a vague reference to existing international legal standards. This would not have been problematic if the impact of the FLA had remained within the borders of the United States. However, as most US clothing multinationals operate through foreign affiliates, the norms and standards of the FLA have been used in judging the foreign affiliates as well. In other words, through the FLA, US norms have been exported. In response, foreign affiliates or trading partners abide by these norms, not because of local legal obligations, but out of fear of losing business.

Furthermore, there is a serious problem when these exported pseudo-laws are ignoring higher standards set out by International Law, such as the right to organise independent labour unions. One can also question the democratic legitimacy of such a pseudo-legal order which interferes with the workings of local, democratically elected, governments. Have these local governments not the primary responsibility to enforce international norms?

However, I am not saying that this development is a bad thing per se. If labour conditions in sweatshops can be improved and the exploitation of workers and child labour can be stopped through rule exportation, then this could be considered in line with one of the basic tasks of International Law: the protection of human dignity.

In conclusion, the FLA-case helped to illustrate developments whereby an emerging global governance mechanism was not founded upon existing International Law theories and practices. In this particular case, through the process of rule-export the emerging global governance mechanism was founded upon domestic American laws and policies.

9.4 Bypassing the State (3)

But what if the International Law system is completely caught off guard by new problems? The Basel Committee seems to have been created in an apparent vacuum of International Law.

State actors and non-state actors seem to be willing to accept proto-laws as genuine international rules when these proto-laws overcome a need for regulation that is not currently being met within the existing state-based system and also is not being met through an extension of the state-based system. Some problems seem to demand, 'sui generis', for international regulatory responses, and thereby alternative institutionalisation through proto-laws. Grande names at least three benefits of this approach:

- Erstens ihre transnationale Reichweite: Sie integrieren - auf die eine oder andere Weise – unterschiedliche territoriale Ebenen politischen Handelns ober – und unterhalb des Nationalstaats und unterschiedliche Typen von öffentlichen und privaten Akteuren. (...)
- Zweitens ihre Policy-Orientierung: Transnationale Regime werden dominiert durch eine starke funktionale Problemorientierung, sei es innerhalb einzelner Politikfelder, sei es politikfeldübergreifend. Entsprechend werden transnationale Politikregime nicht durch territoriale Grenzen, sondern durch – wie auch immer geographisch gestaltete – funktionale Problembezüge abgegrenzt.
- Drittens ihren Regime-Charakter: Der Bereich der transnationale Beziehungen ist trotz aller institutioneller Komplexität gerade durch seine Nicht-Systemhaftighkeit (...) charakterisiert. Er läßt sich deshalb am besten als Regime begreifen.[8]

The Basel Committee represented the important stakeholders responsible for, and depending upon, a standardisation of capital standards in the international banking world. They realised that matters of national prestige would make national politicians unwilling to pursue such a global standardisation. Yet, the representatives of the national banks of the G-10 countries and Luxemburg were also aware of the risks involved for the global economy if this standardisation was not realised. In this case, the representatives used their national mandates (responsibility for the welfare of domestic banking world) to agree upon and implement an international informal policy, a pseudo-law, which had the practical effect of standardising capital standards and was soon followed by all other national banks in the world. In this case, states could do little more than accept this situation, and passively endorse it. The Basel Accord is thus part of the body of international rules that directly and intentionally affect the international financial order, without being a part of International Law.

In conclusion, emerging new regulatory arrangements may have been created outside existing networks of national or International Law. The decision to accept these arrangements as 'proto-laws' is a political one. The option remains open to states to create a new regulatory mechanism founded upon existing International Law theory and practices, to replace the 'alternative' arrangement. Whether they will do so depends on the political urgency of the issue the alternative arrangement set out to regulate.

[8] Grande 2004, pp. 394-395.

9.5 International Law and New Regulatory Arrangements

We have found in the case-studies and examples that traditional International Law may provide a foundation for emerging regulatory mechanisms in International Relations. But we have also found other foundations, such as national laws which are being 'exported'. Furthermore, we have found emerging mechanisms that, although they have no direct connection with state-based International Law, are being 'tolerated' because they are effective. It thus seems that there may be three elements that make up the foundations of emerging regulatory mechanisms in International Law:

1. State-based International Law;
2. 'Exported' national laws;
3. Effective practices.

This third category, of 'effective practices' needs some clarification. First of all it refers to actual or real practices, not some mere 'paper tigers' or vague intentions. Effective practices are practices that are actually having an effect, and are actually changing matters. Secondly, effectiveness also introduces an element of serving, or at least a readiness to serve, like the notion of 'effective manpower'. However, there is a serious risk once we start accepting these effective regulatory practices, which Sassen has called 'new assemblages.' She has noted the development described above as well and writes:

> At the heart of this foundational transformation I see a sharp proliferation of subassemblages bringing together elements that used to be part of more diffuse institutional domains within the nation-state or, at times, the institutionalized supranational system...These are partial and often highly specialized formations centred in particular utilities and purposes...While these are for now still mostly incipient formations, they are potentially profoundly unsettling what are still the prevalent institutional arrangements – nation states and the supranational system.[9]

Sassen is seriously worried that there is a possibility that the 'multiplying intersystemic segmentation' is posing a serious threat to today's ruling normative orders of International Law, and constituting instead particularised novel normative orders internal to each assemblage:

> Herein lies a foundational difference with the medieval period, when there were strong broadly encompassing normative orders (the church, the empire) and the dissaggregations (the feuds, the cities) each contained within them a fairly complete structure involving many if not most aspects of life...Today these assemblages are not highly specialized, partial, and without much internal differentiation, but not even the state can quite counteract the particularized normativities each contains. The norm-making power of the global capital market...illustrates this well. Finally, these assemblages tend to have rules for governance wired into their structures of their system in a way reminiscent of

[9] Sassen 2006, p. 421.

> how free markets function in that these are not explicated rules and norms, as distinct from formalised systems of governance, that are meant to be explicated and outside the system itself.[10]

Thus effective, serving, practices as a founding element of emerging arrangements for regulating International Relations raise the question of what or whom is being served and to what end? What are the normative orders that these emerging arrangements are being founded upon?

These questions are not new. They have been asked for centuries by practitioners and observers of International Law and International Relations in the East and the West. Central in this processes of thoughts and practices, has been the idea that governance by governments or others rests on relationships between people and should be serving those relationships.[11]

Therefore, both International Law and emerging regulatory arrangements in International Relations should be considered a means to an end, not an end in itself. These means are not the result of abstract philosophies. On the contrary, they are founded upon the moral reflections of individual actors on, and their subsequent answers in response to, concrete problems and challenges, brought about by conflicting interests.[12] It is only by a return to man (De Visscher), by linking the concepts of State, organisations and other means, to the Human Dignity of the person, his or her interests, and his or her relationships with other persons, that we can find the sole and moral justification of the obligatory character of the International Law and emerging regulatory arrangements in International Relations enabling the common good. The study of International Law is therefore a moral affair, serving, as St. Thomas Aquinas wrote, mankind and not the other way around.[13]

9.6 A world made strange

This chapter started with the warning of the Anglican archbishop and philosopher Rowan Williams that 'when people set out to prove that nothing has changed, you can normally be sure that something quite serious has.'[14] It seems that some changes have been taking place. Not all emerging arrangements regulating International Relations have been automatically rooted in existing International Law theories and practices. Sometimes emerging regulatory arrangements have intentionally been founded on national laws or international informal policy networks. Further more, it seems that an element of service, of real and effective practices,

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10 Sassen 2006, p. 422.
11 Mulgan 2006, p. 7.
12 Alting von Geusau 2000: p. 39.
13 ST 90.2 where Aquinas writes that "Every law is ordained to the common good [of mankind", RS]. Whereas Aquinas held that the law should serve mankind, more recent theories seem to replace mankind with the individual human being versus mankind (compare Nijman 2004, p. 473).
14 Williams 2005, p. 4.

is important. These new combinations and transformations have made the world of International Law once so familiar, now a bit strange.

Many histories of International Law consist of systematic chronicles of its development throughout the ages.[15] But when arguments are made on the nature of law on the basis of its historical development, then the risk looms large that these are no more than 'just the present in a fancy dress'. [16]Secular International Law has been a dominant theme for many decades in Western philosophy and practice, but was certainly not the foundational idea of Grotius, who is often claimed to be the father of modern International Law.

Indeed, there is a real danger to read ancient texts looking for questions the ancient lawyer is not asking.[17] Studying the history of International Law invites us in a process of questioning and being questioned by the past.[18] According to Williams, the risk of not acknowledging the past is 'as great as that of threatening it as purely and simply as a foreign country'.[19]

However, it seems impossible to have a single 'grid' for understanding the historical developments in the context of economic globalisation. Any narrative of the development of International Law is but a sociological construct of multiple grids that tries to understand the relationships between state-based International Law and emerging regulatory mechanisms of International Relations.

Concluding, the very difficulty of making sense, producing a tidy and edifying story, should become part of the whole enterprise of International Law, and not remain limited to the historical study of International Relations.[20] Making sense of a world made strange and arguing for or against recognising emerging regulatory mechanisms as being part of a transforming body of International Law should be part of the future agenda of international legal studies.

9.7 Conclusion

The conclusion of this study is not that the old system has lost its value and should be dispensed with. Rather, we have found that the emerging bypasses to the state-system of International Law serve in a complementary[21] role to this system, enabling it to survive the difficulties and challenges posed by economic globalisation. The current developments may add a new dimension to the picture

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15 See introduction chapter 2.
16 Compare Williams 2005, p. 24.
17 Compare Williams 2005, p. 7.
18 Recall the discussion in chapter 2 over modern interpretations of Grotius as being the founding father of modern secular International Law, while his work is full of indications to the contrary of that argument.
19 Williams 2005, p. 11.
20 Compare: Williams 2005, p. 10.
21 Lubbers and Koorevaar use the term 'complementary governance' to describe this role (Lubbers and Koorevaar 2000, p. 24).

of International Law, while respecting the already existing pictures, rather as C.S. Lewis once put it:

> A world of one dimension would be a straight line. In a two-dimensional world, you still get straight lines, but many lines make one figure. In a three-dimensional world, you still get figures but many figures make one solid body. In other words, as you advance to more real and complicated levels, you do not leave behind you the things you found on the simpler levels; you still have them, but combined in new ways – in ways you could not imagine if you knew only the simpler levels.[22]

Being aware of law's history and its present context of accelerating globalisation enables an understanding of International Law today in a sense that what the law is now, is subtle enough to encompass the things we do not yet fully understand.[23]

nos sumus tempora: quales sumus, talia sunt tempora.

St. Augustine, Sermo 80.

[22] Lewis 2002, p. 162.
[23] Compare: Williams 2005, p. 24.

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10.3 Summary in Dutch

Hoe verhouden de nieuwe arrangementen waarin internationale economische betrekkingen worden gereguleerd zich tot het bestaande internationale recht?

Naast het bestaande internationale recht, zijn er, mede onder invloed van globaliseringsprocessen, alternatieve arrangementen ontstaan die pogen de internationale economische betrekkingen te reguleren. Deze nieuwe arrangementen zijn een antwoord op nieuwe, of veranderende, reguleringsbehoeften in de internationale economische betrekkingen.

In sommige gevallen is er sprake van een hernieuwde vraag naar regulering die veroorzaakt wordt door veranderingen in de feitelijke omstandigheden waardoor een bestaand regulerend arrangement niet langer als adequaat wordt ervaren. Deze situatie doet zich bijvoorbeeld voor in discussies over de maatschappelijke verantwoordelijkheid van bedrijven voor het beschermen van de mensenrechten. Oorspronkelijk beoogden de mensenrechten het beschermen van de menselijke waardigheid ten opzichte van de staat. Maar geleidelijk aan zijn er verschuivingen opgetreden. De vraag naar respect voor mensenrechten stelt zichzelf ook in de context van nieuwe relaties tussen andere (nieuwe) actoren die internationale contacten onderhouden in een geglobaliseerde context. Deze actoren, waaronder ook bedrijven, worden thans medeverantwoordelijk gehouden voor het respecteren en het actief handhaven van de mensenrechten. Dit is op zich geen nieuwe ontwikkeling, alleen de reikwijdte en intensiteit van de betrokkenheid van niet-statelijke actoren bij de bescherming van menselijke waardigheid zijn de laatste drie decennia meer dan exponentieel gegroeid. Die schaalvergroting heeft ook geresulteerd in een geheel eigen dynamiek in de internationale economische betrekkingen rondom de regulering van vraagstukken over de bescherming van mensenrechten en niet-statelijke verantwoordelijkheden.

In andere gevallen is er sprake van de identificatie van een totaal nieuwe behoefte tot regulering van een situatie die als een internationaal probleem wordt ervaren. Dit doet zich bijvoorbeeld voor rond het mondiale vraagstuk van de opwarming van de aarde, als gevolg van een toename van CO_2 uitstoot, en de regulerende maatregelen waarmee gepoogd wordt deze uitstoot terug te dringen.

De eerste verkennende fase van deze studie die beoogt een beter begrip te krijgen van de verhouding tussen de nieuwe reguleringsarrangementen en het bestaande internationaal recht, bestond uit de bestudering van de historische ontwikkeling van het internationale recht. Hoe heeft men in verschillende historische periodes geprobeerd door middel van internationaal recht een antwoord te geven op nieuwe en/of veranderende reguleringsbehoeften? Daarna werd er gekeken naar beschrijvingen van de ontwikkeling van het internationaal recht in de context van toenemende sociaal-economische globalisering. Doel van de bestudering van deze ontwikkelingsfasen was om mogelijk relevante dimensies van het internationaal recht te identificeren die bepalend zijn voor een reactie van het recht op veranderde omstandigheden of nieuwe reguleringsbehoeften.

Uit deze verkenning van de historische ontwikkeling van het internationale recht komt een vijftal relevante dimensies waarmee we verandering en continuïteit in de verhouding tussen het Internationaal Recht en de Internationale economische betrekkingen kunnen waarnemen: de positie van de actoren; de capaciteiten van actoren om te handelen; de toegang van actoren tot de arena's waarin men tracht het probleem tot een oplossing te brengen; en de mate van legitimiteit van de door de door de betrokken actoren ontwikkelde oplossing; en tenslotte de effectiviteit van de door de betrokken actoren ontwikkelde oplossing.

De tweede, empirische, fase van het onderzoek richtte zich vervolgens op de vraag of met behulp van de in de eerste fase van het onderzoek als relevant geïdentificeerde dimensies een beter inzicht kon worden verkregen in de dynamiek en de veranderende patronen van regulering van internationale economische betrekkingen. Welke ontwikkelingspatronen zijn hierin te herkennen en te beschrijven?

Om deze dynamiek en patronen in kaart te kunnen brengen werd gekozen voor een methode die zich richtte op de uitgebreide bestudering van drie cases, het Kyoto protocol, het de Fair Labor Association en het Global Compact, welke zich alledrie bevinden in het hart van de sociaal-economische globaliserings-dynamiek. Het doel van de bestudering van deze cases en voorbeelden was vooral om een betere beschrijving te kunnen geven van de veranderingen in de vijf relevante dimensies van het Internationaal Recht en de, als gevolg daarvan, mogelijk daarbij behorende verschillende ontwikkelingspatronen.

Hoewel een deel van de verschillen tussen de cases zijn ingegeven door de onderlinge inherente verschillen in de problematiek die men tracht te reguleren, blijkt een belangrijk deel van de uitkomsten te worden bepaald door veranderingen op de relevante dimensies die in het eerste deel werden geïdentificeerd. Op grond van deze dimensies blijken, naast de traditionele internationaal rechtelijke aanpak van nieuwe vragen (Kyoto Protocol), andere ontwikkelingspatronen mogelijk te zijn in de interactie tussen de nieuwe arrangementen van internationale regulering en het bestaande internationale recht. Maar ook de nauwkeurige bestudering van het Kyoto protocol bracht een aantal innovaties aan het licht in de handelswijze en invloed van de niet-statelijke actoren (NGOs en multinaltionals) bij het tot stand komen van nieuwe reguleringsarrangementen in de internationale economische betrekkingen.

Allereerst zijn er patronen mogelijk waarin er sprake is van de creatie van wederzijdse complementaire en hybride structuren. Deze structuren bestaan uit elementen van bestaand internationaal recht en nieuwe niet-internationaalrechtelijke elementen. Deze ontwikkeling zagen we in het geval van het Global Compact. Het idee achter het Global Compact is dat statelijke en niet statelijke actoren allemaal hoeders zijn (custodians) van mensenrechten, arbeidsrechten en de zorg om het milieu. Op zich was deze ontwikkeling al eerder gesignaleerd. Wat het Global Compact anders maakt is dat we hier een initiatief aantroffen waarin de secretaris-generaal van de VN besluit om actief een sprong vooruit te maken om een politieke impasse - over internationale regelgeving met betrekking tot de maat-

schappelijke verantwoordelijkheid van het bedrijfsleven - tussen staten te doorbreken. Hij neemt een initiatief waarin de belangrijkste stakeholders zelf direct betrokken worden bij het werken aan een oplossing. Ook vergeet hij niet om een kritische massa te organiseren van maatschappelijke organisaties die het initiatief van binnen uit zullen bewaken. Een belangrijke zorg is nu wel hoe transparant dit netwerk kan zijn. Er bestaat een risico dat, omwille van bedrijfseconomische belangen, het Global Compact alsnog een gesloten systeem wordt

Ten tweede zijn er patronen mogelijk waarin het nieuwe reguleringsarrangement een 'concurrentiestrijd' lijkt te voeren met het bestaande internationale recht. Hiervan is bijvoorbeeld sprake bij de export van Amerikaanse regulering door middel van de Fair Labor Association (FLA). In het geval van de FLA kwamen bestaande internationale regelingen met betrekking tot de rechten van arbeiders en hun arbeidsomstandigheden niet ter sprake. Hoewel die internationale regelingen hoger waarborgen geven voor de daadwerkelijke bescherming van deze rechten, blijkt in de praktijk de normering door de FLA beter nageleefd te worden door de betrokken actoren. De reden waarom ook niet-Amerikaanse actoren met deze export van Amerikaanse regels en opvattingen akkoord gaan is economisch van aard. Men is bang anders de toegang tot de Amerikaanse consumentenmarkt te verliezen.

Ten derde lijken er zich mogelijkheden te kunnen voordoen waarin niet-statelijke actoren het internationale recht vóór zijn, het recht wordt dan voor een voldongen feit dat er al een alternatieve arrangement is gecreëerd waarmee zaak internationaal gereguleerd wordt, zoals in het geval van het Basel akkoord waarmee deze studie opende.

Conclusies

Er zijn dus tenminste drie verschillende ontwikkelingspatronen te ontdekken in het antwoord op de vraag hoe de nieuwe arrangementen waarin internationale economische betrekkingen worden gereguleerd zich verhouden tot het traditionele internationale recht. Wat alle patronen gemeen lijken te hebben is dat ze in de praktijk als legitiem geaccepteerd lijken te worden zolang ze maar een effectief antwoord weten te geven op de nieuw gerezen, of juist veranderende, reguleringsbehoeften van statelijke en niet-statelijke actoren in de internationale economische betrekkingen.

Die nadruk op effectiviteit heeft ook een keerzijde. Er is namelijk een risico dat een effectief mechanisme zich gaat ontrekken aan hogere standaarden van het Internationaal Recht. In zo'n geval wordt er een alternatief systeem gecreëerd waarin regels gebaseerd zijn op grotendeels impliciete waarden en normen of een zuivere afgeleide zijn van de functie van het netwerk. Daarmee roepen de nieuwe mechanismen voor de regulering van de internationale economische betrekkingen de morele vraag op wat zij uiteindelijk dienen: het systeem omwille van het systeem of de menselijke waardigheid?

Deze studie heeft laten zien hoe zich nieuwe patronen kunnen ontwikkelen in de interactie tussen Internationale Economische Betrekkingen en het Internationale Recht. Het blijft belangrijk om, in het licht van haar geschiedenis en de context van globaliseringsprocessen, ons begrip van het Internationaal Recht iedere keer zodanig bij te stellen dat het adequaat genoeg is om de huidige ontwikkelingen te beschrijven, en subtiel genoeg om ontwikkelingen die we nog niet helemaal begrijpen te kunnen bevatten.

Chapter Overview

sit finis libri,

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The dynamics of International Economic Relations continuously give rise to demands for new regulatory solutions. In this context, International Law historically demonstrated an impressive capacity to adapt to changing circumstances and corresponding regulatory needs. However, the characteristics of the current context are that it is almost self-evidently global and thereby denationalises existing state-oriented meanings and systems. In this study the author sets out the investigate the interaction between new emerging regulatory arrangements in International Economic Relations (the Kyoto Protocol, the Global Compact and the Fair Labor Association) and the existing state-oriented body of International Law.